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No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BOBBY JOE WILSON
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED:

Whether the search of the petitioner's automobile and the resulting seizures were unreasonable in violation of the Fourth * Amendment to the United States Constitution?

*Applicable to a state law enforcement officer via the Fourteenth Amendment.

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BOBBY JOE WILSON,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Bobby Joe Wilson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on August 30, 1988.

OPINIONS BELOW

The opinion of the court of appeals is published at 853 F.2d 869 (11th Cir. 1988) and is reprinted in the appendix. See App. 1a-17a. The relevant portion of the Rule 11 hearing in the district court is reprinted in the appendix. See App. 52a-53a. The Magistrate's Report and Recommendation (App. 40a-49a) is unpublished.

JURISDICTION

The Eleventh Circuit's judgment was dated August 30, 1988. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

U. S. Constitution Amendment 4
U. S. Constitution Amendment 14
These provisions are set forth at App. 57a.

STATEMENT OF THE CASE

On March 1, 1987, Georgia State Trooper Michael Ralston was patrolling on Interstate 75 in Whitfield County, Georgia. As he proceeded southbound he observed a vehicle travelling northbound. The northbound vehicle was passing several other vehicles and, using his radar unit, Trooper Ralston determined that the car was travelling at 66 mph. The maximum speed on that section of Interstate 75 was 55 mph. Ralston crossed the median in pursuit of the northbound vehicle. After following the vehicle for a short distance, Ralston engaged his blue lights and pulled the vehicle over.

Ralston noted that the car bore a South Florida license plate. After stopping the vehicle, Ralston exited his vehicle and asked the driver to step to the rear of his car. The petitioner, Bobby Joe Wilson, was driving the car and, complying with the trooper's direction, got out of his car and met the officer between the vehicles. Ralston asked Wilson for his driver's license and the vehicle's registration. The license Mr. Wilson provided was a Tennessee driver's license which had expired in 1982. The vehicle registration Wilson retrieved from the car showed that the vehicle was registered in Florida to Noel Welch. Wilson explained that he worked in Florida and had borrowed Welch's car for several days to visit relatives in Knoxville. Ralston told Wilson that he would only give him a warning for speeding if the license was valid. Ralston went back to his patrol car to check the license and registration produced by Wilson. A computer check verified the registration but also revealed that Wilson's Tennessee license had been suspended.

Ralston placed Wilson under arrest for driving on a suspended license. After placing Wilson under arrest, Ralston had him place his hands on the cruiser in order to conduct a pat-down search. During the pat-down, Ralston discovered a .22 caliber revolver on the inner portion of Wilson's left leg. Ralston seized the weapon, handcuffed Wilson, and then secured Wilson in the rear seat of his patrol car.

Prior to arresting Wilson, Ralston walked up beside Wilson's car and looked inside the passenger side window of the vehicle. He observed: (1) a short straw, approximately three inches long, with a white powdery substance on it, laying on the front seat; (2) two brown paper bags in the front floor full of used tissues; (3) a kleenex box; and (4) an opaque white bottle labeled "Anacin 3" tucked beneath the lid of the

tissue box. After Ralston placed Wilson under arrest, he entered the vehicle from the passenger side. Upon entering the vehicle, Ralston found the straw laying on the front seat, the tissues, and the Anacin 3 bottle inside the tissue box. Ralston then opened the Anacin 3 bottle and found it contained a white powdery substance. Ralston then activated the trunk release button and proceeded to search the trunk area of the car. Upon opening the truck, he observed an outboard motor gas can. He took the cap off the can and observed several packages inside taped with gray duct tape. Ralston concluded that the packages contained either marijuana or cocaine. Later tests indicated that the packages contained just over 5,000 grams of cocaine. (See Forensic Report, App. 54a).

On May 1, 1987, the petitioner filed a Motion to Suppress the evidence obtained during the March 1, 1987, search of Mr. Wilson's person, the passenger compartment of Mr. Wilson's vehicle, and the trunk of Mr. Wilson's vehicle. A hearing on petitioner's motion was held by the United States Magistrate, Allen L. Chaney, Jr., on July 30, 1987. (The petitioner's motion, supporting brief and the Magistrate's Report are reprinted in the Appendix at 18a-19a; 20a-39a; and 40a-50a, respectively). The Magistrate recommended that the petitioner's "motion to suppress the cocaine, firearm, and all other evidence discovered or derived from evidence discovered by Trooper Ralston in the search of his person and the vehicle on March 1, 1987, be overruled and denied." (Magistrate's Report, App. 40a). The Magistrate's recommendation was accepted by the trial court at a hearing on October 13, 1987. Also, at the October 13 hearing, the petitioner entered a conditional guilty plea, pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, preserving his right to appeal the denial of his motion to suppress.

On appeal from the District Court, the United States Court of Appeals for the Eleventh Circuit concluded "that the arrest of appellant [Wilson] did not violate the fourth amendment and that the district court did not err in denying appellant's suppression motion." 853 F.2d 869, 870 (11th Cir. 1988).

REASON FOR GRANTING THE WRIT

THE SEARCH OF THE PETITIONER'S AUTOMOBILE AND THE SUBSEQUENT SEIZURES WERE UNREASONABLE IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. The search of the passenger compartment was not authorized under this Court's holding in New York v. Belton, 453 U.S. 454 (1981).

This Court's decision in *New York v. Belton*, 453 U.S. 454 (1981), controls the searches of automobiles incident to the lawful[1] arrest of their drivers or passengers. The decision is grounded in the well recognized exception to the warrant requirement of the Fourth Amendment for searches incident to a lawful arrest. In *Belton*, the court stated:

> [W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest,

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[1]The petitioner also contends, however, that his arrest for driving on a suspended license was a mere pretext to justify the search for his vehicle. See *infra*, at 13-24.

> search the passenger compartment of that automobile.

Id. at 460 (emphasis supplied).

The "search incident to a lawful arrest" exception is based on two legitimate rationale. First, it is designed to protect the safety of police officers while engaged in the often dangerous act of arresting suspects. Second, it allows the police officer to protect evidence which a suspect might otherwise be able to reach and destroy.

The *Belton* rule allowing warrantless searches of the passenger compartments of automobiles contemporaneous with the arrest of the automobile's occupant is limited in two important ways. First, a search pursuant to *Belton* is limited by the principles enunciated in *Chimel v. California*, 395 U.S. 752 (1969), which defined the permissible scope of a search incident to a lawful arrest as including only "the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]." *New York v. Belton*, 453 U.S. at 460 (quoting *Chimel v. California*, 395 U.S. at 763.) In *Belton*, the court found that the area into which an arrestee might reach includes the passenger compartment of the automobile searched.

However, in *Belton*, the petitioner had been arrested, along with three other men, for unlawful possession of marijuana. Each of these persons had been patted down and split up into four separate areas of the thruway so they would not be within the physical touching area of each other. *Belton*, 453 U.S. at 456. Prior to the officer's search of the passenger compartment of the car, none of these men had been handcuffed or confined in the back seat of the officer's patrol car. Accordingly, the underlying rationale justifying a search of the passenger compartment

incident to their arrest existed: each of these men were still in a position to reach a weapon or evidence located in the car. Thus, in *Belton*, the concern for the officer's safety and the protection of evidence still existed.

The second important restriction that *Belton* maintained with respect to the search of an automobile incident to the arrest of its occupant is that the search be contemporaneous with the arrest. 453 U.S. at 460. *Belton* does not justify warrantless searches of automobile passenger compartments that are done after the person has been arrested and the underlying rationale justifying a search incident to that arrest are no longer existent.

In the instant case, the search of the passenger compartment of Mr. Wilson's automobile was not justified under the *Belton* decision for two reasons: (1) at the time the search occurred, Mr. Wilson had been handcuffed and confined in the rear of Trooper Ralston's cruiser; thus, the interior of the passenger compartment was no longer within his area of immediate control within the meaning of *Chimel v. California*; and (2) Trooper Ralston's search of the passenger compartment was not done contemporaneously with Mr. Wilson's arrest but was done several minutes after Mr. Wilson's arrest had been completed. For these reasons, Mr. Wilson was no longer in a position to threaten Trooper Ralston's safety or destroy any incriminating evidence. Accordingly, the rationale undergirding the *Chimel* and *Belton* decisions did not exist after Mr. Wilson's arrest and thus the search of the passenger compartment of his vehicle cannot be justified as a search contemporaneous incident to his arrest.

In *United States v. Vasey*, 834 F.2d 782 (9th Cir. 1987), the Government attempted to justify the warrantless search of the passenger compartment of the defendant's vehicle as a search incident to a lawful arrest under *New York v. Belton*. *Id.* at 785. In *Vasey*, the Ninth Circuit rejected the Government's contention because: (1) the search was not properly limited to the area within the defendant's immediate control; and (2) was not conducted contemporaneously with his arrest. *Id.* at 787-788.

In *Vasey*, as in the instant case, the defendant was handcuffed and located in the rear of a police vehicle when the search occurred. Because it was readily apparent to the officers and the court that Vasey had no opportunity to reach into his vehicle at the time the search occurred, the court concluded that this search was not justified under *Belton* because it was not limited to the area within Vasey's immediate control. *Id.* at 787.

Further, the warrantless search in *Vasey* was conducted thirty to forty-five minutes after the defendant's arrest and was thus not conducted contemporaneously with the arrest. The Ninth Circuit rejected the Government's contention that even so the search was proper under the "bright line" rule established in *Belton* stating:

> The Belton Court explicitly admonished that the search had to be conducted contemporaneously with the arrest. The Government, in effect, asks us to transform the search incident to arrest exception into a search <u>following</u> arrest exception. This we decline to do.

Id. at 788 (emphasis in original).

The Circuit Courts of Appeal have taken conflicting positions on the issue of whether a warrantless search can be justified under *New York v. Belton* when the search of the passenger compartment of the vehicle occurs after the vehicle's occupant has been arrested, handcuffed, and effectively removed from the scene. Contrary to the Ninth Circuit's decision in *United States v. Vasey*, *supra*, other circuits have concluded that such warrantless searches are appropriate under *Belton*, even though the drivers of the vehicles have been handcuffed and present no danger of harming the officer or destroying evidence. *E.g.*, *United States v. McCrady*, 774 F.2d 868 (8th Cir. 1985); *United States v. Cotton*, 751 F.2d 1146 (10th Cir. 1985). These courts have justified their holdings that an officer may search and seize articles found within the interior of the automobile as part of the search incident to a lawful arrest even where the arrestee is outside of the vehicle and handcuffed on the grounds that automobile searches involve a lessened expectation of privacy as well as an increased risk of loss due to the vehicle's mobility.

The extension of *Belton* outlined in the *McCrady* and *Cotton* decisions, *supra*, to searches not justified by the rationale undergirding the search incident to a lawful arrest exception to the warrant requirement would allow law enforcement authorities unlimited discretion to search vehicles without a warrant even absent constitutionally required justification. Accordingly, it is clear that his Court should exercise its discretion to again review its holding in *New York v. Belton* to properly define the scope of permissible searches allowed by that decision and thus resolve the conflicting interpretations being given that decision by the various Courts of Appeal.

B. This Court's decision in *United States v. Ross* 456 U.S. 798 (1982), does not permit the search of the trunk because the arresting officer lacked sufficient probable cause to suspect that the petitioner was transporting any contraband.

This Court in *United States v. Ross*, 456 U.S. 798 (1982), considered

> ...the extent to which police officers - who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it - may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view.

Id. at 800.

The government relied on the *Ross* decision as permitting the warrantless search of the trunk after the search of the passenger compartment.

Without the additional evidence obtained from the earlier, unjustified, search of the passenger compartment, the officer would have clearly lacked the probable cause required by *Ross*. However, even assuming that the search of the passenger compartment was lawful, the magistrate was erroneous in his determination that probable cause existed to search the trunk of the vehicle.

The Magistrate's report recognizes the importance of probable cause and finds that the facts known to Trooper Ralston were sufficient to meet *Ross* standard. The seven facts which the Magistrate found

to be known to Ralston before he opened the trunk were:

(1) the petitioner was travelling from South Florida, a principal source area for illegal drugs;

(2) the petitioner was from Tennessee and was driving a vehicle registered in Florida to an individual identified by him as a co-worker;

(3) he was allegedly traveling to Knoxville for the weekend, a long trip in a short period of time;

(4) the petitioner had a gun strapped to his leg which he identified as a knee brace;

(5) the Anacin bottle found in the front seat was one-half to three-fourths full of a white powdery substance, which appeared to be cocaine;

(6) there was a short straw in the passenger compartment which had a white powdery substance on it, boxes of tissues, and a grocery bag full of used tissues, items indicating that the defendant had been using or sniffing cocaine; and

(7) the amount of cocaine in the Anacin bottle was in excess of what a mere user would normally process. (See Magistrate's Report, App. 40a).

The facts in items one through three are completely innocuous. Items four five and six would be consistent with a belief that the petitioner was a user of cocaine: these facts would not support a finding that the petitioner was a trafficker in illegal drugs and was likely to have additional contraband secreted in the trunk. Item seven is the sole fact which, if accurate,

could have provided the probable cause contemplated in *Ross*.

Trooper Ralston testified at the suppression hearing that in his estimate, the Anacin bottle, if full, would contain about 75 grams of cocaine with a street value of approximately $7,500. Defense counsel pointed out the absurdity of this estimate when he questioned Ralston about the physical dimensions of the Anacin bottle. On cross-examination, Ralston agreed with counsel's estimate that the bottle was one inch by one and one half inches. The subsequent laboratory weighing of the cocaine from the bottle confirmed the significant overestimation by Ralston. In fact, the cocaine in the Anacin bottle weighed only 1.5 grams. (See GBI Forensic Report, App. 54a).

The Magistrate's acceptance of Trooper Ralston's inflated figure was clearly erroneous. The true weight of the cocaine would be consistent with the Magistrate's conclusion in item six; that the petitioner was a user of cocaine.

Trooper Ralston had decided he would search the trunk long before he opened the Anacin bottle. His training in drug interdiction led to the exact type of overzealous behavior against which a detached magistrate is designed to protect. However, in this case, the magistrate failed to accurately determine the facts necessary to this inquiry. Accordingly, the probable cause requirements of *Ross* do not exist in this case and this Court should exercise its discretion to review the probable cause finding upon which Trooper Ralston's search of the trunk rests. The probable cause requirements of *Ross* and the Fourth Amendment must be strictly enforced or the exception will swallow the rule.

C. The arrest of the petitioner was a mere pretext to justify the search of the petitioner's automobile.

1. Trooper Ralston has an established history of relying on drug courier profile characteristics as a pretext to search vehicles for the purpose of obtaining consent to search them for narcotics.

Georgia State Trooper Michael Ralston is assigned to patrol Interstate 75 with special responsibilities to interdict drugs moving from the southern states to the northern urban centers. In April, 1986, he attended a special conference, co-sponsored by the Georgia State Patrol and the Drug Enforcement Agency (DEA), entitled "Operation Pipeline". Trooper Ralston was trained to look for certain characteristics or factors that fit into the DEA's "drug courier profile." Each of these characteristics, later used by Ralston, are insignificant when considered separately. Examples of what Ralston was trained to look for are:

(1) cars coming from the southeast, such as Alabama, Florida, South Carolina, or Louisiana;

(2) specifically cars coming from the South Florida area, mainly Miami;

(3) third-party registrations or rental vehicles;

(4) people staying a limited amount of time with a limited amount of clothing;

(5) fast food wrappers in the vehicle or evidence of a person sleeping in the vehicle;

(6) one person staying with the car at all times;

(7) a fairly new vehicle with large amounts of mileage on the odometer;

(8) visible contraband;

(9) two males;

(10) Hispanics; or

(11) traveling to large metropolitan areas such as Chicago, Detroit, or New York.

After the April 1986 conference Ralston faithfully applied the "drug courier profile" as part of the Georgia program known as "Operation Nighthawk". For example, in 1985, Ralston stopped a total of 906 vehicles, thirty-one of which were registered in the State of Florida. In 1986, armed with the "drug courier profile", Ralston stopped 183 cars from Florida representing a 610% increase in stops involving cars from Florida.

Ralston has an established history of using the "drug courier profile" to stop cars as a pretext to investigate and search them for "suspected" contraband. He stated that since he began participating in this program, he asked 100 percent of the people he has stopped from Florida for a consent to search their cars. During the stop and initial investigation of the petitioner, Ralston noted that several of the "courier profile" characteristics applied to the petitioner. But, rather than requesting consent to search, Ralston chose a different approach. He decided to arrest the petitioner for driving on a suspended license and use the arrest as a pretext to search the entire automobile.

2. Arrests made only for the purpose of justifying a search are contrary to the Fourth Amendment's protection against unreasonable searches and seizures.

It is unquestioned that pretextual arrests are unconstitutional. Arrests solely for the purpose of justifying a search violate the accused's Fourth Amendment rights.

> The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right to privacy.... General exploratory searches throughout premises and personal property are forbidden.... Security against unlawful searches is more likely to be attained by resort to a search warrant than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.... An arrest may not be used as a pretext to search for evidence.

United States v. Lefkowitz, 285 U.S. 452, 464-467 (1931).

Searches without a warrant are valid if incident to a lawful arrest and the arrest is not merely a subterfuge to enable a search. This Court has recognized that "there is always the possibility that a police officer, lacking probable cause to obtain a search warrant, will use a traffic arrest as a pretext to conduct a search." *United States v. Robinson*, 414 U.S. 218, 249 (1973).

The lower courts have consistently held that a pretextual arrest invalidates subsequent searches. In

Taglovore v. United States, 291F.2d 262 (9th Cir. 1961), the accused was suspected of narcotics violations, but was arrested instead on warrants for minor traffic violations. The Court held:

> Where the arrest is only a sham or a front being used as an excuse for making such a search, the arrest itself and the ensuing search are illegal . . . to put it in other words, the search must be incident to the arrest and not vice versa. *Id.* at 265.

In *Amador Gonzalez v. United States*, 391 F.2d 308 (5th Cir. 1968), officers arrested a suspect for minor traffic offenses when the officers actually suspected narcotics.

> Gonzalez was arrested for a minor traffic offense. It is not clear at just what time the traffic arrest turned into a narcotics arrest. But it could not have been until after the search. Until that time there was no probable cause to believe that the vehicle was transporting narcotics and no probable cause to make an arrest for the possession of drugs.

Id. at 313 (emphasis in original).

The leading case defining a pretextual vehicle stop is *United States v. Smith*, 799 F.2d 704 (11th Cir. 1986).[2] In *Smith*, a Florida state trooper was observing traffic in an attempt to intercept drug

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[2]*See* also *United States v. Miller*, 821 F.2d 546 (11th Cir. 1981) and *Tarwid v. State*, 184 Ga. App. 853, 363 S.E.2d 63 (1987), *cert. granted.*

couriers. The officer observed an automobile that he thought was being driven in an overly cautious manner. When he observed the automobile cross the right hand line, he pulled the car over. The trial court held that the subsequent search was illegal because the "traffic stop rationale was invalid as pretextual" and the search was constitutionally improper. The Eleventh Circuit agreed and concluded that there was not any reasonable suspicion of criminal activity. The court held that the officer's stop was based on nothing more than an inarticulate hunch and was insufficient to justify the stop.

The court, in upholding the suppression, articulated the following rule:

> We conclude that in determining whether an investigative stop is invalid as pretextual, the proper inquiry is whether a reasonable officer would have mae the seizure in the absence of illegitimate motivation. Because the evidence suggests that a reasonable officer would not have stopped the appellants without an invalid purpose to obtain evidence of additional criminal activity, we reverse.

Id. at 708.

It is unclear from this record whether Trooper Ralston was stopping the car because it was from Florida. But, it is apparent from Ralston's stop record, before and after his drug interdiction training, that he was using motor vehicle violations as a pretense to investigate automobiles he felt would be transporting contraband. After Ralston had stopped the petitioner's automobile, he certainly knew that: (1) the car was from South Florida; (2) it was registered to a

third party; and (3) the petitioner was driving on an expired license. Ralston had also noted items in the car that interested him. When Ralston discovered that petitioner's license was suspended, he effected an arrest. This case is thus but a variation on the *Smith* theme: Would Trooper Ralston have made an arrest for a suspended license in the absence of an illegitimate motivation?

3. The petitioner's arrest for a minor traffic violation was not permitted by applicable Georgia law.

The applicable Georgia law limits an officer's discretion in whether to cite or arrest traffic offenders. By executive order dated August 16, 1979, the governor of Georgia, pursuant to Georgia Code Annotated Section 40-5-5, entered into the Non-Resident Violator Compact of 1977. As of February, 1987, all states involving petitioner, Florida, Georgia, and Tennessee were members of this compact.

Recognizing that most non-residents cited for a traffic violation in other jurisdictions were often forced to post bond, deposit their driver's license in lieu of bond, or were taken directly to jail or custody, the Compact sought to encourage the use of citation rather than arrest of non-residents for traffic offenders. See Article I, Section A, Non-resident Violator Compact of 1977. The explicit intention of the Non-Resident Violator Compact expressed in Article I §(b)(20) is to allow motorists to accept a traffic citation for certain violations and proceed on their way without delay whether or not the motorist is a resident in the jurisdiction in which the citation was issued.

Further, Georgia statutory law does not allow full custody arrests for minor traffic violations. Georgia Code Annotated §17-4-23(a) states:

> a law enforcement officer may arrest a person accused of violating any law or ordinance governing the operation, licensing, registration, maintenance, or inspection of motor vehicles by the issuance of a citation, provided that the offense is committed in his presence or information constituting a basis for arrest concerning the operation of a motor vehicle was received by the arresting officer from a law enforcement officer observing the offense being committed, except that, where the offense results in an accident, an investigating officer may issue citations regardless of whether the offense occurred in the presence of a law enforcement officer. (emphasis supplied).

A law enforcement officer may thus arrest by citation or not arrest at all. The statute continues:

> The arresting officer shall issue to such person a citation which shall enumerate the specific charges against the person and the date upon which the person is to appear and answer the charges. (emphasis supplied).

If the officer decides to make an arrest, then a citation shall issue and the person shall be required only to appear at court. No custodial arrest is contemplated.

This is not the only statute that pronounces the Georgia legislature's view that minor traffic violations

do not warrant a full custody arrest. Georgia Code Annotated §40-13-53(a), provides, in pertinent part:

> Subject to the exceptions set out in subsection (b) of this code section, any officer who arrests any person for the violation of a traffic law or traffic ordinance alleged to have been committed outside the corporate limits of any municipality shall permit such person to be released upon being served with a citation and complaint and agreeing to appear, as provided in this article, unless such officer has a reasonable and probable grounds to believe that the person will not obey such citation and agreement to appear. (emphasis supplied).

Drunk driving, motor vehicle registration violations, speeding in excess of 15 miles per hour, and any other offense which the legislature may have specifically excepted, are the only violations that justify arrest. The legislature therefore contemplated the release of most motor vehicle violators upon the issuance of a citation.

Young v. City of Atlanta, 631 F.Supp. 1498 (N.D. Ga. 1986), supports this interpretation of Georgia law and the Eleventh Circuit erroneously rejected it. In *Young*, a Georgia citizen was arrested for traffic violations. In arriving at a decision as to whether that arrest was legal under applicable Georgia law, the court stated:

> Two other Georgia statutes apply those principles so as to obviate the need for a physical arrest and incarceration for routine traffic violations. O.C.G.A.

> §17-4-23(a) establishes a procedure whereby routine traffic offenders are arrested by citation. That section requires that when a violation of any law or ordinance governing the operation of a motor vehicle results in an accident, the arresting officer shall issue the offender a citation enumerating the charges and the date upon which the offender is to appear and answer the charges. A Georgia traffic offender may only be physically arrested if, following citation for his offense, the offender fails to appear in court, O.C.G.A. §17-4-23(b).

Id. at 1502-1503 (emphasis supplied).

4. Sound public policy supports the petitioner's construction of Georgia law to preclude custodial arrests for minor traffic violations.

It is not surprising that the Georgia legislature has enacted these statutes. As Justice Marshall said in *Berkemer v. McCarty*, 468 U.S. 420 (1984):

> A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may be given a citation, but then in the end he will most likely be allowed to continue on his way.... State laws governing when a motorist detained pursuant to a traffic stop may or must be issued a citation instead of taken into custody vary significantly . . . but no state requires that a detained motorist be

> arrested unless he is accused of a specified serious crime, refuses to promise to appear in court, or demands to be taken before a magistrate.

Id. at 437 (citing Ga. Code Ann. §40-13-53).

Concerns for minimizing abuses of discretion by police officers and the most efficient management of law enforcement efforts support the conclusion that arrests for minor traffic violations is an unsound approach to law enforcement.

> Sound public policy favors the use of appearance tickets for petty traffic offenses. This procedure is practical, efficient, time saving, and economical, for it weeds out of the criminal justice system minor offenders who will answer the ticket and pay their fine without the severe sanction of arrest. The American Law Institutes Model Code of Pre-arraignment Procedure recommends the maximum use of the appearance ticket and the ABA standard 10-2.1 relating to pre-trial release suggests that "it should be the policy of every enforcement agency to issue citations in lieu of arrest . . . to the maximum extent consistent with the effective enforcement of the law." The commentary to standard 10-2.2 expressed the following view:
>
> [F]or many defendants arrests involve a needless and wasteful invasion of personal freedom . . . but the decision concerning the necessity for arrest should not be left to the untrammelled discretion of the arresting officer. The standard that

> permits officers to arrest according to their personal assessment of the defendant is bound to lead to unequal enforcement of the laws."

Arrests for Minor Traffic Offenses, Mendelson, 19 CRIMINAL LAW BULLETIN 501 (1983).

Many jurisdictions have flatly refused to allow arrests for minor traffic offenses. In *State v. Hehman*, 578 P.2d 527, 528 (1978), the Washington Supreme Court said, "We hold as a matter of public policy that custodial arrests for minor traffic violations are unjustified, unwarranted, and impermissible if the defendant [agrees] to appear." In *State v. Martin*, 253 N.W.2d 404 (Minn. 1977), the court held that the Minnesota Rules of Procedure gave the officer "no discretion to subject the defendant to a custodial arrest for a petty misdemeanor." Similarly, in *People v. Wohleben*, 67 Cal. Rptr. 826 (1968), the court ruled that the California Vehicle Code precluded an arrest for running a red light.

In fact, Georgia's sister state, Alabama, has held in interpreting a statute similar to Ga.Code Ann. §17-4-23 and Ga. Code Ann. §40-13-53:

> The clear import of this section is that the police have no authority to take a motorist into custody and then require him to go to the local station house when the motorist has committed a misdemeanor traffic violation but is willing to sign the summons to court.

Morton v. State, 452 S.2d 1361, 1364 (Ala. Cr. App. 1984). In the instant case, Georgia law is clear that

driving while a license is suspended or revoked is a misdemeanor. See Ga. Code Ann. §40-5-121.

Georgia Code Annotated §17-4-23 clearly directs the officer to issue a citation rather than arresting the violator. Under the Traffic Violations Bureaus Act, Ga. Code Ann. §40-13-53, the legislature once again directed that a citation was to issue rather than a full custody arrest. The governor of Georgia has entered into a binding reciprocal agreement whereby he agrees that citations are to be used in lieu of arrests for most misdemeanor traffic offenses. Finally, the balancing of the individual's reasonable expectation of privacy and the need of law enforcement to enforce motor vehicle regulations clearly weighs on the side of the individual when an officer wishes to effect a full custody arrest for a misdemeanor traffic offense.

In our case, given that: (1) a citation is to issue instead of a full custody arrest; (2) Trooper Ralston has demonstrated a proclivity for searching Florida cars; and (3) the only traffic violation here is the misdemeanor of driving on a suspended license, it is clear that Trooper Ralston, in violation of applicable statutes, effected a full custody arrest to obtain access to the car. Even if, arguendo, the statutes are construed as allowing the officer to discretionarily make full custody arrests, as opposed to issuing a citation, this case clearly shows the danger of allowing that discretion. When an officer has demonstrated his willingness and tendency to search, without any reasonable suspicion, the vehicles of a select geographic and ethnic subsection of our population, that discretion leads to invalid law enforcement practices.

CONCLUSION

For the reasons stated herein, this Court should exercise its discretion to grant the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Bobby Joe WILSON,
Defendant-Appellant

No. 87-8914.

United States Court of Appeals,
Eleventh Circuit.

Aug. 30, 1988.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT and KRAVITCH, Circuit Judges, and PAINE *, District Judge.

*Honorable James C. Paine, U.S. District Judge for the Southern District of Florida, sitting by designation.

KRAVITCH, Circuit Judge:

Once more this court must decide whether evidence should have been suppressed as the fruit of a pretextual "seizure" of a person for violation of a traffic offense.[1] We conclude that the arrest of appellant did not violate the fourth amendment and that the district court did not err in denying appellant's suppression motion.

I.

As the facts are largely undisputed, we accept them as recited in the magistrate's report and recommendation. On the morning of March 1, 1987, Georgia State Patrol Trooper Michael Ralston was driving his cruiser south on Interstate 75 in Gordon County, Georgia. Ralston noticed a vehicle traveling north that was passing other cars heading in the same direction. Ralston activated his radar unit and determined that the observed vehicle was traveling 66 miles per hour in a zone with a speed limit of 55 miles per hour. Ralston decided to stop the vehicle for exceeding the speed limit, crossed over the median strip, and pursued the speeding car. During his pursuit, he noticed that the car was a Chevrolet Caprice bearing a Florida license tag. After following the Chevrolet for five miles, Ralston engaged his blue light and pulled the car to the side of the road.

Ralston asked the driver to step out of the car. He met the driver at the rear of the car and requested the driver's

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[1] *See United States v. Bates*, 840 F.2d 858 (11th Cir. 1988); *United States v. Miller*, 821 F.2d 546 (11th Cir. 1987); *United States v. Smith*, 799 F.2d 704 (11th Cir. 1986); *cf. United States v. Basey*, 816 F.2d 980 (5th Cir. 1987); *Tarwid v. State*, 184 Ga. App. 853, 363 S.E.2d 63 (1987).

operator license and automobile registration. The driver furnished an expired Tennessee license issued to Bobby Joe Wilson and a Florida vehicle registration issued to Noel Welch. The driver, who was in fact Wilson, explained that he worked in Florida with Welch and had borrowed Welch's automobile to visit relatives in Knoxville, Tennessee. Ralston advised Wilson that he had been stopped for speeding and for following too closely. Ralston told Wilson that he needed to check the status of Wilson's operator license, but that he would issue a warning for the speeding if Wilson's operator license was in order.

Before he returned to the cruiser, Ralston looked inside the Caprice and saw, on the front passenger seat, a short white straw covered with a powdery substance. Ralston also observed two brown paper bags filled with tissues, a box of tissues, and a white container that appeared to be a bottle of Anacin. Ralston then radioed his headquarters to investigate the status of Wilson's operator license and Welch's vehicle registration. After ten minutes, Ralston learned that the vehicle registration was current but that Wilson's license had been suspended in Tennessee.

Ralston placed Wilson under custodial arrest and conducted a pat-down search of Wilson's person. During the pat-down, Ralston felt an object on Wilson's left leg and ascertained that the object was a .22-caliber revolver. After putting Wilson in the back seat of the patrol car, Ralston opened the right-hand door of the Caprice to investigate the short straw and the Anacin bottle. Ralston discovered more white powder inside the bottle and concluded that the powder was cocaine. The trooper then opened the trunk of the car, where he found an outboard motor gasoline can. Inside the can were several packages of what appeared to be cocaine.

A federal grand jury indicted Wilson on one count of possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841, and one count of using and carrying a firearm during the commission of a felony, in violation of 18 U.S.C. § 924(c). Wilson moved to suppress all evidence obtained as a result of the search and seizure of his person and vehicle, raising the arguments to be discussed *infra* in this opinion. After an evidentiary hearing, a magistrate concluded that the search and seizure did not violate the fourth amendment and recommended that the evidence not be suppressed. The district court adopted the findings and recommendations of the magistrate. Pursuant to Fed.R.Crim.P. 11(a)(2), Wilson entered a conditional plea of guilty preserving his right to appeal the suppression order. Wilson now appeals his conviction.

II.

A.

Wilson argues that his arrest for driving with a suspended license was a mere pretext for Trooper Ralston's search and seizure of his person and vehicle on suspicion of narcotics offenses. We stress that Wilson does not argue that Ralston's initial stop of the vehicle for speeding was pretextual. This concession by Wilson sharply limits our task in this case. As the initial *stop* for speeding was neither pretextual nor lacking in probable cause, we may consider only whether the additional facts and circumstances occurring after Ralston decided to stop Wilson but before he arrested Wilson rendered the *arrest* for driving with a suspended license

unreasonable.[2] "In assessing a claim of pretextual arrest, 'the proper inquiry is whether a reasonable officer *would* have made the seizure in the absence of illegitimate motivation.'" *United States v. Bates*, 840 F.2d 858, 860 (11th Cir. 1988) (quoting *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986)) (emphasis in *Smith*). Of course, "probable cause for a stop does not justify an unrelated search," *Bates*, 840 F.2d at 861, but certainly information obtained during a valid stop can justify a subsequent arrest and search, if a reasonable officer would have made the arrest and search absent a pretext.

Wilson contends principally that Georgia law does not permit police officers to make custodial arrests for the offense of driving with a suspended license; accordingly,

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[2]We do not imply that there will never be a circumstance in which probable cause will exist to justify a traffic stop but will not suffice to justify a more intrusive custodial arrest. Indeed, Wilson argues that under Georgia law, police officers have no power to make custodial arrest for the offense for which he was arrested, namely driving with a suspended license. Although we reject that argument in this case, we do not foreclose the possibility that state law or municipal policy might prohibit police officers from making custodial arrests for certain minor offenses, and that a custodial arrest made for such an offense in disregard of that law or policy would be constitutionally unreasonable. *See, e.g., Young v. City of Atlanta*, 631 F.Supp.1498, 1501, 1503 (N.D.Ga.1986)(noting that Atlanta police manual limits police officers' authority to effect custodial arrests for traffic offenses).

his arrest was unreasonable as a matter of law.[3] Wilson

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[3]Wilson also relies on Georgia cases holding that "(a) search of a vehicle may not be made incident to the arrest of the driver for a mere traffic violation." *Mobley v. State*, 130 Ga.App. 80, 202 S.E.2d 465, 467 (1973) (defendant arrested for speeding and riding brakes; police discovered marijuana during search of vehicle), *overruled in part on other grounds sub nom. Patterson v. State*, 238 S.E.2d 233, 232 S.E.2d 233, *cert. denied*, 431 U.S. 970, 97 S.Ct. 2932, 53 L.Ed.2d 1067 (1977); *accord Rowland v. State*, 117 Ga.App. 577, 161 S.E.2d 422, 423 (1968) (defendant arrested for running stop light; police discovered evidence of possession of excess quantities of tax-paid whiskey during search of vehicle). As expressions of state law, these cases do not help Wilson. *Mobley* and *Rowland* hold only that a police officer has no authority to search a vehicle even after he has made a lawful arrest for a traffic offense. They provide no guidance as to the police officer's authority to make a custodial arrest for a traffic offense in the first place. The cases do not assist us in answering the crucial question posed by *Bates* and *Smith*: Would a reasonable police officer have made the *seizure* (here, the arrest) in the absence of illegitimate motivation? Under *Bates* and *Smith*, we must focus on the reason.

To the extent that cases such as *Mobley* and *Rowland* state a rule of federal constitutional law, the accuracy of the rule stated therein is highly questionable since *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). *Belton* held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460, 101 S.Ct. at 2864 (footnotes omitted). Admittedly, the search in *Belton* took place

relies primarily on O.C.G.A. § 17-4-23(a):

A law enforcement officer may arrest a person accused of violating any law or ordinance governing the operation, licensing, registration, maintenance, or inspection of motor vehicles by the issuance of a citation provided the offense is committed in his presence or information constituting a basis for arrest concerning the operation of a motor vehicle was received by a law enforcement officer observing the offense being committed, except that, where the offense results in an accident, an investigating officer may issue citations regardless of whether the offense occurred in the presence of a law enforcement officer....

As Wilson interprets this statute, the section gives police officers the *authority* to make arrests for traffic ordinances ("A law enforcement officer *may arrest*....") but conditions that arrest authority on its being exercised by the issuance of a citation, not the execution of a fully custodial arrest. The government argues that the statute's use of the term "may arrest" merely provides law enforcement officers with the discretion to issue citations rather than make custodial arrests for traffic offenses and

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after the police officer arrested the occupants for possession of marijuana, not for a traffic offense, but Wilson has not attempted to distinguish *Belton* on that ground. We therefore have no occasion to consider whether the *Belton* rule justifies the search of an automobile incident to a lawful custodial arrest for a "mere" traffic offense.

does not restrict their arrest authority to the issuance of citations.[4]

Wilson's construction of the statute is not entirely without merit and has been accepted by at least one

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[4]Although the statutory use of the word "may" is usually interpreted as conferring discretion, not creating a mandatory duty, "[t]his commonsense principle of statutory construction is by no means invariable ... and can be defeated by legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute." *United States v. Rodgers*, 461 U.S. 677, 706, 103 S.Ct. 2132, 2149, 76 L.Ed.2d 236 (1983). Indeed, this principle of construction appears not to be presumptively correct under Georgia law. The word 'may' has frequently been held to mean 'must.' The use of the permissive word 'may' is always to be considered in connection with its context and subject matter." *Wilson-Weesner-Wilkinson Co. v. Collier*, 62 Ga.App. 457, 8 S.E.2d 171, 176 (1940). In *Independent Bankers Association v. Dunn*, 230 Ga. 347, 197 S.E.2d 129 (1973), the Georgia Supreme Court held that a writ of mandamus could issue to compel the Superintendent of Banks to take action to restrain a clear violation of the banking law, even though the governing statute provided that "[t]he Superintendent of Banks of this State *may* bring an appropriate civil action to enforce any provision of this Chapter...." "The true rule for the construction of the word *may* in a statute is, that when such statute concerns the public interest, or affects the rights of third persons, then, the word *may*, shall be construed to mean *must* or *shall*." *Id.* 197 S.E.2d at 138 (quoting *Birdsond & Sledge v. Brooks*, 7 Ga. 88, 89 (1849)). In this case, we find a review of the statutory background and the purpose of O.C.G.A. § 17-4-23(a) more helpful than a rigid rule of construction.

district court. *See Young v. City of Atlanta*, 631 F.Supp. 1498, 1503 (N.D.Ga. 1986). His interpretation is fortified by the second sentence of the subsection, which states that an officer "may issue citations" whenever a traffic offense results in an accident, even if the accident occurs outside the presence of an officer. Presumably this second sentence is a grant rather than a restriction of authority; in permitting the issuance of citations for accidents occurring outside the presence of an officer, it expands the police officer's authority from that given in the previous sentence, which allows an officer to arrest by citation whenever a traffic offense is committed in his (or another officer's presence).

We nevertheless adopt the government's construction rather than Wilson's for two reasons. First, the section on which Wilson relies must be understood against a statutory background that includes O.C.G.A. § 17-4-20(a), Georgia's general arrest statute. Section 17-4-20(a) provides that "[a]n arrest for a crime may be made by a law enforcement officer either under a warrant or without a warrant if the offense is committed in his presence or within his immediate knowledge...." This section, which predates section 17-4-23, gives police officers the authority to make warrantless arrests for traffic offenses committed in their presence even absent the authority conferred by section 17-4-23. The Georgia legislature did not need to enact section 17-4-23 to give Ralston the authority to make the arrest in this case.[5] We

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[5]The objection might be made that traffic offenses are not "crimes" within the meaning of § 17-1-20(a) and, therefore, that section affords no authority for arrests on traffic offenses. Whatever might be the force of this objection on other facts and circumstances, driving with a suspended license certainly falls within the statutory language. *See Jackson v. United States*, 352 F.2d 490,

therefore think it more reasonable to construe the "may arrest" language of section 17-4-23 as affording police officers the discretion to arrest by issuing citations, not as providing them with the power to arrest for traffic offenses only by citation.

Second, section 17-4-23 must be squared with O.C.G.A. § 17-6-11(a). Section 17-6-11(a) provides that a person who is arrested for violation of a traffic law (except any offense for which his license may be suspended for a first offense) and is served with a summons "may deposit his chauffeur's or driver's license with the apprehending officer in lieu of bail, in lieu of entering into a recognizance for his appearance for trial as set in the aforesaid summons, or in lieu of being incarcerated by the arresting officer and held for further action by the appropriate judicial officer."

Although the term "may" is again employed, rendering the matter not entirely free from doubt, we think section 17-6-11(a) permits the issuance of a citation and the deposit of a driver's license as an alternative to custodial arrest and incarceration, while leaving such arrest and incarceration as a viable procedure. Such was definitely the case under the predecessor to section 17-6-11(a), which stated that a person arrested for violation of a traffic offense could *"upon agreement with the arresting officer"* deposit his driver's license in lieu of bail or incarceration pending an appearance before a magistrate. As the former section 17-6-11(a) authorized such alternatives to arrest and incarceration only upon agreement between the officer and the arrestee, it would

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491 (5th Cir. 1965) (per curiam), *cert. denied*, 385 U.S. 825, 87 S.Ct. 55, 17 L.Ed.2d 62 (1966); *cf.* O.C.G.A. § 40-5-121(a) (driving with suspended license is misdemeanor).

hardly be sensible to construe another section of the Georgia Code as making such alternatives mandatory upon the arresting officer.[6]

B.

Wilson relies in the alternative on O.C.G.A. § 40-13-53(a) as support for his argument that Ralston had no legal authority to place him under custodial arrest. That section provides:

Subject to [certain exceptions], any officer who arrests any person for the violation of a traffic law or traffic ordinance alleged to have been committed outside the

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[6]The annotated edition of the Georgia Code indicates that the Georgia legislature enacted the predecessor to § 17-4-23 in 1969 and the predecessor to § 17-6-11 in 1973. It seems most unlikely that the Georgia legislature would first enact a statute requiring police officers to arrest traffic violators by citation only and would then, four years later, pass a law authorizing police officers to accept a driver's operator license in lieu of bail but implicitly preserving the officers' power to make a custodial arrest of traffic violators and to bring them before a judicial officer.

Furthermore, it is doubtful that Trooper Ralston would have had the authority under § 17-6-11 to accept Wilson's suspended driver's license in lieu of bail. Section 17-6-11 explicitly excepts from the police officer's authority to accept a driver's license in lieu of bail any situation in which the driver is arrested for a traffic offense carrying the suspension of the driver's license as a penalty. Ralston arrested Wilson for driving with a suspended license, which carries an additional period of suspension as a penalty. *See* O.C.G.A. § 40-5-121(b).

corporate limits of any municipality shall permit such person to be released upon being served with a citation and complaint and agreeing to appear, as provided in this article, unless such officer has reasonable and probable grounds to believe that the person will not obey such citation and agreement to appear.

Unlike O.C.G.A. § 17-4-23(a), this section states that an officer *shall* issue a citation to a person arrested for violation of a traffic ordinance. O.C.G.A. § 40-13-53(a) appears to make arrest by citation mandatory. For two reasons, we conclude that O.C.G.A. § 40-13-53(a) does not apply to the facts of this case.

First, section 40-13-53(a) governs only arrests for traffic violations "alleged to have been committed outside the corporate limits of any municipality." The record does not indicate that Ralston arrested Wilson outside the corporate limits of any municipality. Although the arrest was made by a state trooper (not a city police officer) on an interstate highway, we are unwilling to conclude from these facts alone that the site of the arrest lay outside the limits of any town or city. Wilson introduced no evidence below that would establish whether O.C.G.A. § 40-13-53(a) applied to this case, and the magistrate made no findings on this issue.

Second, we do not believe that the term "violation of a traffic law or traffic ordinance" in section 40-13-53(a) includes the offense of driving with a suspended license. As the government points out, O.C.G.A. § 40-13-53(a) is part of an article in the Georgia Code governing the establishment and jurisdiction of traffic violations bureaus within the courts of the state of Georgia. O.C.G.A. § 40-13-60, also part of that article, states that "[a]ny traffic violation under the jurisdiction of the traffic violations bureau shall be characterized and classified as a traffic violation and shall not be considered as a

misdemeanor." The Georgia Code elsewhere provides, however, that driving with a suspended license shall be considered a misdemeanor and shall be punishable by imprisonment for not less than two days and not more than six months. *See* O.C.G.A. § 40-5-121(a).

The Georgia legislature has expressly classified driving with a suspended license as a misdemeanor. We cannot believe that the legislature also intended for that offense to be classified as a "traffic violation" and *not* a misdemeanor whenever a traffic violations bureau is established under the authority of O.C.G.A. § 40-13-60. If driving with a suspended license is not a "traffic violation" within the meaning of O.C.G.A. § 40-13-60, it is almost certainly not a "violation of a traffic law or traffic ordinance" within the meaning of O.C.G.A. § 40-13-53(a), which was enacted at the same time and as part of the same act. In our view, therefore, driving with a suspended license is not an offense to which O.C.G.A. § 40-13-53(a) applies.[7]

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[7]*Duncan v. Ricketts*, 232 Ga. 89, 205 S.E.2d 274 (1974), is not to the contrary. In that case, the Georgia Supreme Court held that a Georgia statute authorizing the revocation of parole without a hearing upon a parolee's conviction for a "crime" did not permit such revocation upon a parolee's failure to appear in court on charges of speeding and weaving across lines. The Georgia Supreme Court noted that the county in which the speeding and weaving took place had a traffic violations bureau; therefore the "traffic offenses" were not misdemeanors and also "crimes" within the language of the parole revocation statute. The parolee had been charged with driving under the influence, which was and is a misdemeanor in Georgia, *see* O.C.G.A. § 40-6-391(c), but this charge was dropped. 205 S.E.2d at 275.

III.

Having concluded that Ralston's arrest of Wilson was not unreasonable in law, we consider whether it was unreasonable under the facts and circumstances of this case. Would a reasonable police officer have arrested Wilson for driving with a suspended license absent a motive to conduct an unrelated search for narcotics not supported by probable cause? We conclude that a reasonable officer would have done so.

Much of the evidence on which Wilson relies is simply not relevant to the determination of whether Ralston's *arrest* of Wilson was pretextual. For example, Wilson introduced the testimony of Willis Kervin, a civil engineer who conducted a study of the speed of vehicles traveling on Interstate 75 in Northern Georgia. Kervin concluded that the average speed of vehicles traveling on I-75 was 69.1 miles per hour, or 3.1 miles per hour above Wilson's speed. Wilson also relies on Ralston's testimony at the suppression hearing. Ralston admitted that in April 1986 he attended a seminar sponsored by the Drug Enforcement Administration and the Georgia State Patrol concerning characteristics of drug couriers using the interstate highway system. Ralston learned at that seminar that drug couriers are frequently Hispanics traveling from Florida to large northern cities, carrying only a limited amount of clothing, and driving rental cars, cars with third-party registrations, or new cars with a large amount of mileage on the odometer. Wilson introduced a summary of records of the Georgia State Patrol indicating that the number of Florida registered vehicles stopped by Ralston increased by 610% from 1985 to 1986, and that this increase also represented a rise from 3% to 20% of the total number of vehicles stopped by Ralston.

There is no dispute that speeding is quite common on Interstate 75, even at speeds well above that at which Wilson was traveling, or that Trooper Ralston stopped many more Florida vehicles for speeding in 1986 than he did in 1985. Whatever relevance these facts might have to an explanation of Ralston's decision to *stop* Wilson for speeding, they have no bearing on Ralston's subsequent decision to *arrest* Wilson for driving with a suspended license.[8] Furthermore, Wilson has not challenged the magistrate's finding that Ralston decided to stop Wilson for speeding once Ralston ascertained that Wilson was driving at 66 miles per hour, i.e., before Ralston could

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[8]We do not mean that an illegal traffic stop will never taint a search incident to a subsequent arrest for a different offense if the police obtain probable cause to make the arrest during the illegal stop. In *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), a police officer made an illegal stop of an automobile to check the driver's operator license and registration. During the stop, the officer discovered marijuana in plain view on the car floor and arrested the driver of the automobile. The Supreme Court affirmed the state court's decision to suppress the marijuana as the fruit of an unconstitutional seizure. Presumably any evidence discovered during a search incident to the arrest would have been suppressed as well. *Cf. United States v. Hensley*, 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) (during investigative stop of defendant, officer observed revolver under passenger seat of car; defendant was arrested and search of automobile revealed three handguns; defendant challenged admission of all three handguns, but Supreme Court upheld stop as valid). We simply mean that the evidence adduced by Wilson cannot explain whether Ralston's *arrest* of Wilson, rather than his stop, was pretextual.

have known that Wilson fit some points of the drug courier profile.

As to Ralston's decision to make a custodial arrest, Wilson essentially had no evidence indicating that this decision was unreasonable. One sheet of Wilson's summary of Ralston's investigative activity broke down Ralston's traffic stops into Florida and non-Florida drivers given warnings, citations, both, or neither, but these statistics did not show that Florida drivers were placed in *custodial* arrest a disproportionate number of times. Indeed, the statistics suggest that Ralston was more lenient to Florida drivers than to non-Florida drivers once he stopped their vehicles; whereas 75% of drivers of Florida vehicles stopped by Ralston in 1986 were released with mere warnings, only 61% of other drivers were treated so lightly that year.

Not only was there an absence of evidence indicating that Ralston's arrest of Wilson was pretextual; Ralston testified that the arrest conformed to normal policies and practices of dealing with persons driving with a suspended license, even those persons not suspected of drug offenses. Ralston testified, "Anytime you have a person who is driving on a suspended license you arrest the person and take him to the sheriff's department whereas [sic] he can post bond, and the vehicle will be towed in, and someone else will have to come get the vehicle.... That's the way the department operates." Wilson offered no evidence suggesting that this was not the way the department operated, and the district court was entitled to credit Ralston's testimony.[9]

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[9]Ralston had, of course, observed the short straw with the white powdery substance by the time he decided to place Wilson under arrest. The fact that Ralston may have suspected Wilson of possession of narcotics does not

Ralston's action also appears reasonable in light of O.C.G.A. § 17-6-11(a). As explained above, that section permits police officers to accept a driver's operator license in lieu of detaining the driver and requiring him to post bond or appear before a magistrate. The police officer gives the driver a receipt for his license, which may be used as a permit to drive during the pendency of the case for which the license was deposited. It would be most odd if Georgia police officers could accept a *suspended* operator license in lieu of detaining a driver and could give the driver a receipt which was the equivalent of a *valid* operator license in permitting the driver to use a motor vehicle in Georgia. Placing the driver under arrest and detaining him for a short time pending an appearance before a magistrate or a posting of bond seems a reasonable method of charging the driver with the offense of driving with a suspended license and removing the driver from the road. It is true, as Wilson suggests, that Trooper Ralston could have simply ordered Wilson out of the car, forbidden him to drive any further, and required him to make arrangements for having his car towed off the interstate highway. Such procedure, however, was not the only reasonable option available to Ralston.

Accordingly, the judgment of conviction is AFFIRMED.

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automatically mean, however, that Ralston's arrest of Wilson on an unrelated offense was pretextual. "An objectively reasonable stop is not invalid solely because the officer acted out of improper motivation." *United States v. Smith*, 799 F.2d at 708-09. The relevant question, rather, is "whether under the same circumstances a reasonable police officer would have made the [seizure] *in the absence* of the invalid purpose." *Id.* at 709 (emphases omitted and added).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA	) :)	
V	:) :	CRIMINAL ACTION NUMBER
BOBBY JOE WILSON	)	87-09R

MOTION TO SUPPRESS

Defendant, Bobby Joe Wilson, through his counsel, Robert W. Ritchie, respectfully moves the Court to enter an order suppressing all evidence obtained as a result of or derived from the detention or arrest of defendant Wilson and the search of his person, the vehicle in his possession and under his control, or the contents thereof on March 1, 1987, and in support thereof avers:

On the 1st day of March, 1987, the vehicle in the possession and control of defendant Wilson was searched by Georgia State Patrol Trooper Michael Ralston and various substances, items, and articles were seized from the defendant and the vehicle.

The defendant avers that the search and seizure of the defendant and the above-described property was unreasonable and illegal and in violation of the Fourth Amendment of the Constitution of the United States, for the following reasons:

(1) The search was without a search warrant and in the absence of exigent circumstances.

(2) The search was the product of a prior unlawful arrest.

(3) The search was the product of a prior unlawful activity in that the stop of the vehicle was invalid as a pretextual stop in that a reasonable officer would not have stopped the defendant in this cause without an invalid purpose to obtain evidence of additional criminal activity.

(4) The search violated the defendant's reasonable expectation of privacy.

(5) The property seized was not "in plain view" because the objects seized were not themselves in plain view and/or the officers had no right to be in a position for the view obtained of the articles ultimately seized.

(6) The search was illegal because the search was from the defendant's vehicle which was illegally stopped and/or the search of the defendant's vehicle was not incident to the arrest or basis for the stop.

Respectfully submitted,
RITCHIE, FELS & DILLARD, P.C.

By:
Robert W. Ritchie
Attorney for the Defendant Wilson
1130 First American Center
Knoxville, TN 37902
615 637-0661

I certify that a true and exact copy
of the foregoing motion was this 30th
day of April, 1987, forwarded or
delivered to the office of the
United States Attorney, Atlanta,
Georgia.

Robert W. Ritchie

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA	) :	
v.	) :) :	CRIMINAL ACTION NO. CR-87-09R
BOBBY JOE WILSON	)	

BRIEF IN SUPPORT OF MOTION TO SUPPRESS ON BEHALF OF BOBBY JOE WILSON

This is a brief of law in support of Bobby Joe Wilson's Motion to Suppress heard before the honorable Alan L. Chancey, Jr., United States Magistrate for the United States District Court, Northern District of Georgia, Rome Division. This Motion was heard on Juiy 30, 1987. The transcript of that hearing will be cited as (TR__).

STATEMENT OF FACTS

This case involves a vehicle stop on March 1,1987, with a subsequent warrantless search. Trooper Mike Ralston of the Georgia Patrol executed the stop.

(1) Trooper Ralston's Training and Past Activities

Prior to April of 1986, Trooper Ralston testified that the main law enforcement emphasis for a Georgia trooper was drunk driving. (TR 11). In April of 1986, Trooper Ralston attended a class called Operation

Pipeline. In that class they were taught characteristics that indicated a vehicle might be carrying drugs. (TR 12). Trooper Ralston was assigned primarily to Interstate 75 after the Operation Pipeline class. (TR 14). Trooper Ralston lists as characteristics or factors that a trooper on the interstate will look for that make him suspicious of drug couriers:

1) cars coming from the southeast, such as Alabama, Florida, South Carolina, New Orleans, or Louisiana;

2) specifically cars coming from the South Florida area, mainly Miami;

3) third-party registrations or rental vehicles;

4) people staying a limited amount of time with a limited amount of clothing;

5) fast food wrappers in the vehicle or evidence of a person sleeping in the vehicle;

6) one person staying with the car at all times;

7) fairly new vehicles with large amounts of mileage on the odometer;

8) visible contraband;

9) two males;

10) Hispanics; and

11) traveling to large metropolitan areas such as Chicago, Detroit, or New York. (TR 34-37).

Trooper Ralston's activities changed dramatically after he was assigned to drug interdiction. In 1985, before he began his drug interdiction activities, he stopped a total of 31 cars from Florida. (TR 34). In 1986, he stopped 183 cars from Florida, an increase of 610 percent. (TR 39). In some months in 1986, he stopped almost the same number of cars as he had for the whole year of 1985. (TR 39). Ralston agreed that he had given more warning tickets to Florida drivers than to non-Florida drivers since. April of 1986, (TR 103). Since April of 1986, Trooper Ralston has asked for and

obtained consent to search Florida cars in approximately 100 cases. (TR 102).

Mr. Willis Dunn Kervin, a Civil Engineer specializing in Transportation (TR 110), at the direction of the defendant, did a speed survey in the vicinity of mile marker 319 on northbound Interstate 75. Mr. Kervin's survey showed that the average speed on the interstate was 69.1 miles per hour. Almost all cars, 97.9 percent, traveling excess of the sped limit. (TR 114).

(2) The stop

Trooper Ralston testified that on March 1, 1987 while he was traveling south on I-75, he saw a northbound vehicle which his radar showed him to be doing 66 miles per hour. (TR 14). He further testified that he crossed the median, pursued the car, and pulled it over with his blue lights. (TR16). Mr. Wilson exited the vehicle and when requested to do so showed Trooper Ralston a Tennessee driver's license. That license was expired. (TR 16). The registration of the vehicle showed it was registered in Florida to Noel Welch. Mr. Wilson explained that he and Mr. Welch had swapped vehicles for the weekend to enable Mr. Welch to use Mr. Wilson's truck on a job and to enable Mr. Wilson to travel to Knoxville to visit relatives. (TR 17). Trooper Ralston had noted certain things in the vehicle. (TR18). He had noticed a straw with a white powdery substance on it, kleenexes, a white bottle, and two brown paper bag full of used tissues. (TR19). Trooper Ralston performed a computer check and found that Mr. Wilson's license was suspended in Tennessee. Trooper Ralston placed Mr. Wilson under arrest. He patted him down and felt something on his left leg which turned out to be a .22 revolver. (TR 18). Trooper Ralston then entered the car and found an Anacin bottle which contained a white powder. (TR 19). He then went from the interior of the car directly to the truck. (TR22). Trooper Ralston agrees that the kleenexes, the straw, and the bottle he observed

were perfectly innocuous items. (TR 76-81). Trooper Ralston agrees that nothing about discovery of the white powder during the search of the passenger compartment would give rise to the probable cause to believe that contraband was in the trunk of the automobile. In the trunk he found a gasoline can which contained several taped plastic packages. (TR 22). Trooper Ralston originally said that he arrests 100 percent of the people with an expired driver's license. When shown a citation he wrote for a suspended license where the cited party was not arrested (Glen A. Sparks, TR 69), Trooper Ralston agreed that he did not always affect a full custody arrest of persons with expired or suspended licenses.

Trooper Ralston failed to issue a citation for speeding, the original basis for the stop. (TR 102).

ISSUES

A. WAS THE TRAFFIC ARREST PRETEXTUAL?

B. DID TROOPER RALSTON HAVE PROBABLE CAUSE TO SEARCH THE TRUNK?

ARGUMENT OF LAW

A.WAS THE TRAFFIC ARREST PRETEXTUAL?

It is clear from the record that Trooper Ralston has been using traffic stops as a pretext to investigate and search vehicles he suspects are transporting drugs. Trooper Little in April of 1986 attended a law enforcement class titled Operation Pipeline. In that class he was taught characteristics of drug couriers on the interstate

system. (TR 11-12). Before that class, Trooper Ralston had stopped only 31 Florida cars in all of 1985. (TR 34). In 1986 he stopped 183 cars from Florida, an increase of 610 percent. (TR 39). In fact in some months in 1986, he had almost as many Florida stops as he had in the year of 1985; August 1986 - 30, October 1986 - 25. (TR 39).

Mr. Kervin's speed survey shows that the 97.9 percent of the vehicles on northbound Interstate 75 are exceeding the 55 mile per hour speed limit, that the average speed is 69.1 miles per hour, and that 85 percent of the vehicles are going faster than 64.1 miles per hour. It becomes apparent that an officer intent upon drug interdiction can use motor vehicle regulation to further that purpose. Given that the vast majority of travelers on the interstate are violating the speeding laws, an officer can pick and choose whom he stops, when and where he pleases. That this is being done is clear from the change in behavior Trooper Ralston's traffic activities demonstrate.

The selective enforcement of the traffic laws is not somehow cured by lists the characteristics or factors that a trooper on the interstate will look for that make him suspicious of drugs. Among these are many innocuous factors, i.e., fast food wrappers in the vehicle, evidence of a person sleeping in the vehicle, new vehicles with high mileage, people staying short amounts of time with a limited amount of clothing, and rental vehicles or third-party registrations. None of these things indicate criminal activity. Trooper Ralston also notes whether the cars are coming from the southeast, such as Alabama, Florida, South Carolina, New Orleans, or Louisiana, and specifically notes whether they are from the Southern Florida area, mainly Miami. (TR 36). Trooper Ralston notes their destination and his suspicions are aroused if it is Chicago, Detroit, or New York. (TR 39). These two characteristics must indeed cover a vast majority of the vehicles traveling on northbound I-75, because I-75 is a

major route from the southeast, including Alabama, Florida, etc., and the destinations noted by Trooper Ralston include the two largest metropolitan areas in the north.

Finally, Trooper Ralston notes that males, and especially Hispanics, arouse his suspicion. These are particularly disturbing factors because they discriminate based on ethnic origin and gender. Even more disturbing is the fact that Trooper Ralston in the thirteen to fourteen months since he began participating in a drug interdiction program has asked 100 of the people he has stopped from Florida for a consent to search the cars, and in 98 percent of those cases indeed searched the car. (TR 102).

Trooper Ralston noted that the defendant Wilson was speeding. Trooper Ralston considered the speeding offense of 66 miles per hour important enough for him to cross the median and pursue Mr. Wilson at speeds in excess of 100 miles per hour. (TR 48). However, Trooper Ralston never issued a Georgia traffic citation for this offense of speeding. (TR 102).

Trooper Ralston's selective enforcement of the Georgia traffic laws demonstrates that given a discretionary choice on his part, he will exercise that discretion as a tool to pry into automobiles for South Florida that he considers suspicious. Whether that tool be selective enforcement of a traffic regulation or use of discretionary arrests to search, it is clear that Trooper Ralston has a propensity to get into Florida vehicles.

1) Pretextual arrests are unconstitutional.

Arrests solely for the purpose of justifying a search violate the accused Fourth Amendment rights.

> The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right to privacy. . . . general exploratory searches throughout premises and personal property are forbidden . . . security against unlawful

> searches is more likely to be attained by resort to search warrant than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime . . . an arrest may not be used as a pretext to search for evidence. *United States v. Lefkowitz,* 285 U.S. 452, 464-467, 76 L.Ed. 877, 882-884 (1931).

Searches without warrants are valid incident to lawful arrests as long as the arrest is not merely a subterfuge to enable to search. The Supreme Court has recognized that "there is always the possibility that a police officer, lacking probable cause to obtain a search warrant, will use a traffic arrest as a pretext to conduct a search," *United States v. Robinson,* 414 U.S. 218, 248, 38 L.Ed.2d 427, 448 (1973).

The courts have consistently held a pretextual arrest invalidates subsequent searches. In *Taglovore v. United States,* 291 F.2d 262 (9th Cir. 1961), the accused was suspected of narcotics violations, but was arrested instead on warrants for minor traffic violations. When approached with the warrant, the accused attempted to swallow something and fled. The officers forcibly extracted the item, a marijuana cigarette, and arrested the accused for possession. The Court held here:

> Where the arrest is only a sham or a front being used as an excuse for making a search, the arrest itself and the ensuing search are illegal . . . to put it in other words, the search must be incident to the arrest and not vice versa. Id. at 265.

In Amador Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968), officers arrested a suspect for minor traffic offenses, and the officers actually suspected narcotics.

> Gonzalez was arrested for a minor traffic offense. It is not clear at just what time the traffic arrest turned into a narcotics arrest. But it could not have been until after the search. Until that time there was no probable cause believe that the vehicle was transporting narcotics and no probable cause to make an arrest for the possession of drugs. (p. 313).

Roving traffic stops are a serious intrusion to the individual's privacy "because the unexpected stop is pregnant with greater annoyance and inconvenience and more likely to frighten or embarrass." *United States v. Montgomery,* 561 F.2d 875 883 (D.C. Cir. 1977). Full-blown vehicle searches following a routine traffic stop, have the same subjective impact.

> This inspecting of defendant's driver's license was not conducted for the purpose of enforcing the vehicle control laws, but was a maneuver for investigating defendant's suspicious conduct. Id. at 885.

United States v. Smith, 799 F.2d 704 (11th Cir 1986) is the leading case defining a pretextual vehicle stop. A Florida state trooper was observing traffic in an attempt to intercept drug couriers. The officer observed an automobile that he thought was being driven in an overly cautious manner. When he observed the automobile cross the right hand line, he pulled the car over. The trial court held that the subsequent search was illegal because the "traffic stop rationale was invalid as pretextual"

and the search was constitutionally improper. The Eleventh Circuit agreed and held that there was not any reasonable suspicion of criminal activity. The court held that the officer's stop was based on nothing more than an inarticulate hunch and was insufficient to justify the stop. The Court in upholding the suppression articulates the following rule:

> We conclude that in determining whether an investigative stop is invalid as pretextual, the proper inquiry is whether a reasonable officer would have made the seizure in the absence of illegitimate motivation. Because the evidence suggests that a reasonable officer would not have stopped the appellants without an invalid purpose to obtain evidence suggests that a reasonable officer would not have stopped appellants without an invalid purpose to obtain evidence of additional criminal activity, we reverse. Id. at 708.

It is unclear from this record whether Trooper Ralston was stopping the car because it was from Florida. But it is apparent from Trooper Ralston's stop record, before and after his drug interdiction training, that Trooper Ralston was using motor vehicle violations as a pretense to investigate automobiles he felt could be transporting contraband. After Trooper Ralston had stopped the automobile, he certainly knew that the car was from South Florida, knew it was registered to a third party, and knew that Mr. Wilson was driving on as expired license. Trooper Ralston had also noted items in the car that interested him. When Trooper Ralston discovered that Mr. Wilson's license was suspended, he effected an arrest. That arrest enabled him to search the car. Our case is but a variation on the Smith theme: Would

Trooper Ralston have made an arrest for a suspended license in the absence of an illegitimate motivation?

2) Under Georgia law, can a trooper make a valid custodial arrest for a suspended license?

Trooper Ralston at first during the Motion to Suppress Hearing maintained that he arrests everyone with an expired driver's license. (TR 30). However, Trooper Ralston admitted that that was not true, that he had before merely cited someone for a similar violation. (TR 69). In fact, Georgia law limits an officer's discretion in whether to cite or arrest traffic offenders.

a) Georgia has signed an Interstate Compact requiring Tennessee, Florida, and Georgia to cite, not arrest, non-resident violators.

By executive order dated August 16, 1979, the governor of Georgia pursuant to Georgia Code Annotated §40-5-5 entered into the Non-Resident Violator Compact of 1977. The compact's effective date is February 1, 1980. As of February 1987, Florida, Georgia, and Tennessee were all members of the compact.

Recognizing that most non-resident cited for a traffic violation in jurisdictions other that their homes were often forced to post bond, deposit their driver's license in lieu of bond, or were taken directly to trial or custody, the Compact sought to encourage the use of citation rather than arrest of non-residents for traffic offenders. See Article I, Section A, Non-resident Violator Compact of 1977. The explicit intention of the Non-resident Violator Compact expressed in Article I §(b) (2) is to allow motorists to accept a traffic citation for certain violations and proceed on their way without delay whether or not the motorist is a resident in the jurisdiction in which the citation was issued.

b) Georgia does not allow arrests for traffic citations except for specified violations.

The Georgia statutes do not allow full custody arrests for minor traffic violations.

Georgia Code Annotated 17-4-23 (a) states:

> a law enforcement officer may arrest a person accused of violating any law or ordinance governing the operation, licensing, registration, maintenance, or inspection of motor vehicles by the issuance of a citation, provided the offense is committed in his presence or information constituting a basis for arrest concerning the operation of motor vehicle was received by the arresting officer from a law enforcement officer observing the offense being committed, except that, where the offense results in an accident, an investigating officer may issue citations regardless of whether the offense occurred in the presence of a law enforcement officer.

A law enforcement officer may arrest by citation or not arrest at all, but the next sentence of the statute clearly shall issue and the person shall be required only to appear at court. No custodial arrest is contemplated. That sentence provides:

> The arresting officer <u>shall</u> issue to such person a citation which shall enumerate the specific charges against the person and the date upon which the person is to appear and answer the charges. (Emp. Supplied).

This is not the only statute that pronounces the legislature's view that minor traffic violations do not

warrant a full custody arrest. In Georgia Code Annotated 40-13-53(a)

> Subject to the exceptions set out in this subsection (b) of this code section, any officer who arrests any person for the violation of a traffic law or traffic ordinance alleged to have been committed outside the corporate limits of any municipality shall permit such person to be released upon being served with a citation and complaint and agreeing to appear, as provided in this article, unless such officer has a reasonable and probable grounds to believe that the person will not obey such citation and agreement to appear.

Drunk driving, motor vehicle registration violations, speeding in excess of 15 miles per hour, and any other offense which the traffic court may have excepted are the only violations that justify arrest . Again, the legislature contemplates the release of motor vehicle violators upon the issuance of a citation.

In Young v. City of Atlanta, 631 F.Supp. 1498 (N.D.Ga. 1986), a Georgia citizen was arrested for traffic violations. In arriving at a decision as to whether that arrest was legal or not, the court said

> Two other Georgia statutes apply those principals so as to obviate the need for a physical arrest and incarceration for routine traffic violations. O.C.G.A. §17-4-23(a) establishes a procedure whereby routine traffic offenders are arrested by citation. That section requires that when a violation of any law or ordinance governing the operation of a motor vehicle results in

> cident, the arresting officer shall issue the offender a citation enumerating the charges and the date upon which the offender is to appear and answer the charges. A Georgia traffic offender may only be physically arrested if, following citation for his offense, the offender fails to appear in court, O.C.G.A. §17-4-23(b) or if the arresting officer has personal knowledge that the offender was intoxicated to the extent that he was incapable of driving safely . . . pp. 1502-1503. (Emphasis supplied).

It is not surprising that the Georgia legislature has enacted these statutes. As Justice Marshall said in Berkemer v. McCarty, 468 U.S. 420, 82 L.Ed.2d 317 (1984)

> A motorist's expectations, when he sees a policeman's light flashing behind him are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may be given a citation, but then in the end will most likely will be allowed to continue on his way . . .[26]
>
> [26]State laws governing when a motorist detained pursuant to a traffic stop may or must be issued a citation instead of taken into custody vary significantly . . . but no state requires that a detained motorist be arrested unless he is accused of a specified serious crime, refused to promise to appear in court, or demands to be taken before a magistrate. Citing Ga. Code Ann. §40-13-53.

Concerns for minimizing abuses of discretion by police officers and management of law enforcement ef-

forts in the most efficient manner leads one to view that arrest for minor traffic violations is an unsound approach to law enforcement.

> Sound public policy favors the use of appearance tickets for petty traffic offenses. This procedure is practical, efficient, time saving, and economical, for it weeds out of the criminal justice system minor offenders who will answer the ticket and pay their fine without the severe sanction of arrest. The American Law Institute Model Code of Pre-arraignment Procedure recommends the maximum use of the appearance ticket and the ABA standard 10-2.1 relating to pre-trial release suggests that 'it should be the policy of every enforcement agency to issue citations in lieu of arrest . . . to the maximum extent consistent with the effected enforcement of the law.' The commentary to standard 10-2.2 expresses the following view:
>
> '[F]or many defendants arrests involves a needless and wasteful invasion of personal freedom . . . but the decision concerning the necessity for arrest should not be left to the untrammelled discretion of the arresting officer. The standard that permits officers to arrest according to their personal assessment of the defendant is bound to lead to unequal enforcement of the laws.' "Arrests for Minor Traffic Offenses" Mendelson, 19 Criminal Law Bulletin 501 (1983).

Many jurisdictions have flatly refused to allow arrests for minor traffic offenses. In State v. Hehman, 578 P.2d 527, 528 (1978). the Washington Supreme Court

said, "We hold as a matter of public policy that custodial arrests for minor traffic violations is unjustified, unwarranted, and impermissible if the defendant [agrees] to appear." In State v. Martin, 253 N.W.2d 404 (Minn. 1977). the court held that the Minnesota Rules of Procedure give the officer "no discretion to subject defendant to a custodial arrest for a petty misdemeanor." Similarly, in People v. Wohleben, the court ruled that California Vehicle Code precluded an arrest for running a red light. 67 Cal. Rptr. 826 (1968).

In fact, Georgia's sister, Alabama, has held in interpreting a statute similar to Ga. Code Ann 17-4-23 and Ga. Code Ann. §40-13-53:

> The clear import of this section is that the police have no authority to take a motorist into custody and then require him to go to the local station house when the motorist has committed a misdemeanor traffic violation but is willing to sign the summons to court. Morton v. State, 452 S.2d 1361, 1364 (Ala. Cr. App. 1984).

In the instant case, Georgia law is clear that driving while a license is suspended or revoked is a misdemeanor. See Georgia Code Annotated 40-5-121.

Georgia Code Annotated §17-4-23 clearly directs the officer to issue a citation rather than arresting the violator. Under the Traffic Violations Bureaus Act, Ga. Code Ann. 40-13-53 the legislature once again directed that a citation was to issue rather that a full custody arrest. The governor of Georgia has entered into a binding reciprocal agreement whereby he agrees that citations are to be used in lieu of arrests for most misdemeanor traffic offenses. Finally, the balancing of the individual's reasonable expectation of privacy and the need of law enforcement to enforce the motor vehicle regulations

clearly balances on the side of the individual when an officer wishes to effect a full custody arrest for a misdemeanor traffic offense. In our case, given that a citation is to issue instead of a full custody arrest, given that Trooper Ralston has demonstrated a proclivity for Florida cars and drug interdiction, and the only violation here is the misdemeanor of driving on a suspended license, it is clear that Trooper Ralston, in violation of the statute, effected a full custody arrest to obtain access to the car. Even if, arguendo, the statutes are construed as allowing a discretionary use of a citation or full custody arrests, this case clearly shows the danger of that discretion. When an officer has clearly demonstrated his willingness and tendency to search, without any reasonable suspicion, the vehicles of a select geographic and ethnic subsection of our population, that discretion leads to invalid law enforcement practices.

As Stevens warned in Robbins v. California, 453 U.S. 420, 69 L.Ed.2d 744 (1981),

> But if there were no reason to believe that anything more than a traffic violation had occurred. I should think it palpably unreasonable to require the driver of a car to open his briefcase or his luggage for inspection by the officer. The driver so compelled, however, could make no constitutional objection to a decision by the officer to take the driver into custody and thereby obtain justification for a search of the entire interior if the vehicle. Indeed, under the Court's rule, the arresting officer may find reason to follow that procedure whenever he sees an interesting looking briefcase or package in a vehicle that has been stopped for a traffic violation. That decision by a police officer will therefore provide the

> constitutional predicate for broader vehicle searches than any neutral magistrate could authorize by issuing a warrant. U.S. 451-452, L.Ed.2d 766-767.

B. DID TROOPER RALSTON HAVE PROBABLE CAUSE TO SEARCH THE TRUNK?

Trooper Ralston, after arresting Mr. Wilson, entered the car and searched the passenger compartment. He found a straw with white powder on it, an Anacin bottle that contained a white powdery substance, and kleenexes. (TR 19). Trooper Ralston performed no field test on the substance in the white bottle. (TR 85). Trooper Ralston agreed that he had no information there was contraband in the truck of the car. (TR 87-88). Trooper Ralston however searched the trunk and uncovered more suspected contraband there. (TR 92-93).

Trooper Little's candid admission that he did not have probable cause to think there was contraband in the trunk is supported by state law. In Wimberly v. Superior Court of San Bernadino Cty., 547 P.2d 417 (Ca. 1976)

> In light of the foregoing principals, we can only conclude that the existence of probable cause to search the interior of a car is not necessarily sufficient to justify the search of the car's trunk. A search based on probable cause which reasonably only tends to support the inference that contraband or evidence will be found in the passenger compartment will be of intolerable intensity in scope if expended to include a closed trunk. Id. at 424.

> Just as the statutes differentiate between the casual user and a dealer of narcotics . . . logic compels that we also differentiate between the two and recognize that all ca-

> sual users are not dealers. Here, the erratic driving, the plain view observation of the marijuana seeds adjacent to the pipe, and the small quantity of marijuana secreted in the jacket indicate only that petitioners were casual users of marijuana. It was thus proper to search adjacent areas of the vehicle . . . but it was not reasonable to infer that petitioners had additional contraband hidden in the trunk. Id. at 427.

In State v. Petino, 394 A.2d 365 (N.J. Sup. 1978), the court suppressed the fruits of a search of a locked trunk.

> Simply because he found a small amount of marijuana in the passenger compartment, entirely consistent with possession for personal use, did not provide him with facts that would lead a police officer of ordinary prudence to conscientiously entertain a strong suspicion that criminal contraband was present in the locked trunk. p. 379.

In Hawkins v. State, 607 S.W.2d 400 (Ark. App. 1980), the court suppressed the fruits of an illegal trunk search saying:

> A 'roach clip' and part of a marijuana cigarette found in the console ash tray of the vehicle did not provide the probable cause required for a warrantless search of the contents of the locked trunk of the car, nor did they provide the reasonable belief required for a warrantless search pursuant to Rule 12.4 of the Arkansas Rules of Criminal Procedure. p. 400.

From the facts of this record, it is apparent that Trooper Ralston had at most probable cause to think that the defendant had contraband in an amount sufficient for his own personal use. Trooper Ralston admitted that he had no reason to believe that Mr. Wilson would be hauling more contraband. Despite that admission, Trooper Ralston proceeded immediately to search the locked trunk. He did so without probable cause.

Conclusion

Trooper Ralston had been engaged in a drug interdiction program where traffic arrests are used for pretext to gain access to cars that the Georgia State Patrol deemed suspicious. Although in this case it is not clear that Trooper Ralston decided to stop the car for that purpose, once stopped it becomes clear that Trooper Ralston decided to effect a full custody arrest for the same purpose, i.e. to gain access to the vehicle. In contravention of Ga. Code Ann. 17-4-23, Ga. Code Ann. 40-13-53, and the Non-resident Violators Compact, Trooper Ralston effected a full custody arrest and proceeded to search the passenger compartment of this vehicle. That arrest being in violation of both Georgia law and strong public policy, the arrest is illegal, and the fruits of that arrest should suppressed. Wong Sun v. United States, 371 U.S. 471, 9 L.Ed.2d 441, (1963). Further, even if the arrest is considered valid, Trooper Ralston had no probable cause to search the trunk after finding what he considered to be contraband in the passenger compartment. Therefore, we respectfully request that this Court suppress the evidence of the contraband found in the trunk of Mr. Wilson's car.

Respectfully submitted,
RITCHIE, FELS, & DILLARD, P.C.

By:_____
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CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the Brief in Support of Defendant Wilson's Motion to Suppress Evidence to Gentry Shellnut, Assistant United States Attorney, by depositing in the United States Mail a copy of the same in a properly addressed envelope with sufficient postage thereon.

This the 3rd day of September, 1987.

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Robert W. Ritchie

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA,	)	CRIMINAL ACTION
Plaintiff,	:	NO. CR87-09R
	)	
vs.	:	MAGISTRATE'S
	)	REPORT AND
	:	RECOMMENDATION
BOBBY JOE WILSON,	)	UPON DEFENDANT'S
	:	MOTION TO
	)	SUPPRESS
Defendant.	:	

Defendant Bobby Joe Wilson has been charged in a two-count indictment in this case with on or about March 1, 1987, possession of cocaine with intent to distribute (21 U.S.C. §841 (a)(1)) and carrying a firearm during commission of the offense of possession of cocaine with the intent to distrubute (18 U.S.C. §924(c)). On March 1, 1987, Georgia State Patrol Tropper Michael James Ralston found the cocaine in the search of the vehicle defendant was driving and the firearm in the search of his person after having stopped defendant for a traffic violation and subsequently arrested him. Contending that the vehicle stop and subsequent arrest and search and seizures violated his Fourth Amendment rights and were illegal, the defendant has moved to suppress the cocaine, firearm and all other evidence discovered or derived from evidence discovered by Trooper Ralston.

The Magistrate held an evidentiary hearing on July 30, 1987. The Government called Trooper Ralston as a witness, introduced and played a video tape of the vehicle stop, arrest and searches and introduced other exhibits. The defendant called Willis Dunn Kervin, Jr., a consulting engineer, and introduced certain exhibits. At the conclusion of the hearings, the parties requested and were granted up to and including August 14, 1987, which was later extended to September 4, 1987, in which to file post-hearing briefs. Now, after reviewing the testimonyand evidence presented at the hearing, and after considering the post-hearing briefs and applicable law, the Magistrate enters the following findings, conclusions and recommendation that the motion to suppress be denied.

FINDINGS OF FACT

On Sunday morning, March 1, 1987, Trooper Ralston was on patrol duty driving his cruiser south along Interstate I-75 in Gordon County, Georgia. At about 11:30 a.m., as he approached milepost 319, his attention was directed to a vehicle traveling north in the northbound lanes and passing other vehichles traveling north. The maximum speed limit along I-75 in Georgia is 55 miles per hour and Trooper Ralston activated his radar unit and determined that the vehicle was traveling 66 miles per hour. He made a decision to stop the vehicle for speeding, crossed over the median between the south and northbound lanes, entered the northbound lane, and pursued the vehicle. Trooper Ralston stated that he drove at speeds in excess of 100 miles per hour until he caught up with the vehicle at about milepost 323 when it ran up behind a van and swerved off to the right hand side of the roadway. The trooper also stated that he noted at this time the vehicle bore a south Florida license plate. After notifying his radio operator of a description of the vehi-

cle, color, year model and license number, and the location at which it was being stopped, Trooper Ralston engaged his blue lights and pulled the vehicle over near milepost 324 in Whitfield County, Georgia. (TR. 13-15, 22, 25, 42-49, 55-59).

After the vehicle had stopped. Trooper Ralston pulled his patrol cruiser in behind and activated a video camera mounted in the cruiser to produce a sound video tape recording of the stop. However, the body mike or transmitter to produce the audio or sound portion was not working and only the video portion was made. The trooper then asked the driver of the vehicle to step to the rear, which he did. They met between the two vehicles and stepped to the right-hand side of the road. Trooper Ralston then asked to see his driver's license and vehicle registration, and the driver produced a Tennessee license in the name of Bobby Joe Wilson which had expired in 1982. The defendant Wilson also obtained and produced the registration to the vehicle which showed the vehicle to be registered in Florida to a Noel Welch. The defendant stated that he had been working in Florida with Welch and had borrowed the vehicle to go to Knoxville to visit relatives for the weekend. Trooper Ralston advised defendant that he had stopped him for speeding and running up too close behind the van but needed to check the status of his driver's license and would write him a warning for the speeding if his driver's license was in order and he would promise to slow down. The trooper testified that he normally stopped all vehicles exceeding 63 miles per hour. (Tr. 15-16, 20-23, 60-64, 96; Govt. Ex. 1 and 2).

Before returning to the patrol cruiser to check on the status of the driver's license, Trooper Ralston walked up along the right-hand side of defendant's vehicle and observed laying in the front seat a short straw with a white powdery substance on it. He also observed there

were two brown paper bags in the floorboard full of used tissues, a Kleenex tissue box laying in the middle of the front seat with a white bottle, believed to be an Anacin bottle, tucked beneath the lid or edge of the tissue box. He also noted the left rear tail-light had a piece of gray duct tape on it for no apparent reason. The trooper then returned to his patrol cruiser and radioed his headquarters to check on the status of defendant's driver's license and warrants through Tennessee. He also asked for a registration check on the vehicle through Florida. After approximately ten minutes, Trooper Ralston was advised that defendant's driver's license had been suspended in Tennessee, but there was no problem with the vehicle registration. The trooper then exited the patrol cruiser, advised defendant that he was under arrest for driving on a suspended license, and, after having defendant place his hands on the vehicle, conducted a pat-down search of his person. During the pat-down of defendant, Trooper Ralston felt an object on the inner portion of his left leg and asked him what it was. The defendant replied that it was a knee brace, but on further examination the trooper discovered that it was a .22 Magnum revolver. (Tr. 16-18, 23, 63-65).

Trooper Ralston has been a trooper with the Georgia State Patrol since 1979. He testified that whenever a driver has been stopped and found to have a suspended license and there is nobody else to drive the vehicle, the normal procedure is to arrest the person and take him to the sheriff's department to post bond and to have the vehicle towed in until someone who has a valid license can come get the vehicle. He explained that a citation for the person's appearance in court which would serve as a temporary driver's license could not be issued when an individual was arrested for driving on a suspended driver's license. The trooper also explained that when an individual is arrested and is to be placed in the patrol car for transportation to the sheriff's office, the normal pro-

cedure is to handcuff that person. Trooper Ralston stated that after he arrested defendant Wilson for driving on a suspended license, he handcuffed him and placed him in the back seat of the patrol cruiser. (Tr. 25-26, 66-73).

In April, 1986, Trooper Ralston attended a two-day training session sponsored by the Drug Enforcement Administration as a part of its drug interdiction along the interstate highway system program entitled "Operation Pipeline". He was given special training in identifying and apprehending drug couriers using the interstate highway, characteristics and factors to consider when making a routine traffic stop to determine whether the stopped motorist may also be involved in the activity of transporting drugs. Some of the characteristics or factors he was trained to look for and consider include that the south Florida area is known as a major distribution center for illegal drugs, drug couriers often travel in large comfortable size rental vehicles or vehicles registered to persons other than the individual driving the vehicle, would be traveling from the south Florida area to an area and only staying a limited amount of time with a limited amount of clothing, and evidence of any contraband in visible view in the vehicle. (Tr. 11, 28, 34-37).

After having placed defendant in the back seat of his patrol cruiser, Trooper Ralston then proceeded to the right-hand side of defendant's vehicle, a Chevrolet Caprice, opened the door, and removed the short straw with powdery substance, the tissues and the Anacin III bottle, which he had previously observed from outside the vehicle. The trooper opened the Anacin III bottle and found that it was approximately one-half to three-quarters full of white powdery substance. Based on his prior experience and training, Trooper Ralston believed that the white powdery substance in the bottle and on the short straw was cocaine and that the straw had been used to sniff cocaine. The trooper also stated that he estimated

the Anacin bottole would hold about 75 grams of cocaine with a street value of approximately $7,500, which would be more cocaine than a mere user would normally have. (Tr. 18, 76-90; Deft.'s Ex. 3.4 and 5).

After removing the above items from the passenger compartment, Trooper Ralston, using the trunk release button in the passenger compartment, opened the trunk where he observed a rusty brown or red outboard motor gas can. After picking up the can and observing that the bottom had been cut or split, the trooper removed the cap and observed inside several packages taped with gray duct tape, which turned out to be cocaine. From prior experience, Trooper Ralston knew that bundles packaged in that way usually contained cocaine or illegal drugs. Thereafter, the Whitfield County Sheriff's Office was notified, and a wrecker was sent to tow the vehicle, and defendant was taken to Whitfield County Jail. (Tr. 19, 24, 93-95).

As noted above, the defendant called Willis Kervin, a consulting engineer, and introduced certain exhibits. Mr. Kervin testified that on June 15, 1987, he conducted a speed study in the vicinity of milepost 319 on I-75 where Trooper Ralston first observed defendant on March 1, 1987, and, using radar, determined that he was traveling 66 miles per hour in a 55 mile per hour zone. He stated that his study showed that the average speed of vehicles traveling north at that location during a 24-hour period is 69.1 miles per hour, and 43 percent were traveling at speeds in excess of 65 miles per hour. (Tr. 109-119; Deft.'s Ex. 6 and 7). The defendant also introduced as an exhibit a chart of analysis of records of the Georgia State Patrol showing that the number of Florida vehicles stopped by Trooper Ralston significantly increased in April, 1986, after he received his special training in identifying and apprehending drug couriers. (Deft. Ex. 1).

CONCLUSIONS OF LAW

Standing

Defendant's standing to challenge the search and seizures from his person and the vehicle is undisputed.

The Vehicle Stop

The defendant argues that the initial stop of the vehicle for speeding was pretextual. He maintains that the fact that the vehicle he was driving was from south Florida and that, after his drug interdiction training in April, 1986, Trooper Ralston's stop record for cars from Florida significantly increased over his stop record prior to that date shows that the trooper was using the speeding violation as a pretense to investigate for a possible drug violation. The Magistrate concludes that this argument is totally without merit.

The facts in the instant case clearly show that Trooper Ralston's decision to stop defendant was based on the fact that the defendant was driving 66 miles per hour in a 55 mile per hour speed zone. At the time the trooper made the decision to cross over from the south lane of I-75 to the northbound land and pursue and stop the vehicle, he did not know the vehicle bore a Florida license plate and was from south Florida. Trooper Ralston's stop of defendant's vehicle was based on probable cause from an observed speeding violation and was objectively reasonable. See, Maryland v. Macon, 472 U.S. 463, 105 S.Ct. 2778, 86 L.Ed.2d 370 (1985). The fact that he learned that it bore a south Florida license tag prior to the stop and, based on his drug interdiction training, might have also been suspicious of possible drug activity, does not render the stop for speeding invalid as pretextual. See, United States v. Smith, 799 F.2d 704 (11th Cir. 1986).

The Custodial Arrest

The defendant next argues that his custodial arrest for driving with a suspended license was in violation of Georgia law and invalid. He contends that Georgia statutes, O.C.G.A. §17-4-23(a), and O.C.G.A. §40-13-

53(a), do not allow full custody arrest for minor traffic violations but require that a citation directing the offender to appear and answer the charges be issued instead. The Magistrate disagrees.

As pointed out by the government, there are a number of Georgia statutes which pertain to arrest of individuals generally and traffic offenders in particular. The general arrest statute allows a law enforcement officer to arrest for a crime without a warrant if the offense is committed in his presence or within his immediate knowledge. O.C.G.A. §17-4-20(a) In the instant case, defendant was driving with a suspended license in the presence and within the immediate knowledge of Trooper Ralston. Driving with a suspended license is a misdemeanor under Georgia law. O.C.G.A. §40-5-12(a). Thus, under these statutes, Trooper Ralston was clearly authorized to arrest defendant for driving with a suspended license. See, Jackson v. United States, 352 F.2d 490 (5th Cir. 1965).

While O.C.G.A. §17-4-23(a) states that an officer may arrest by citation persons accused of minor traffic violations, the Magistrate does not interpret this statute as prohibiting full custody arrest and requiring that a citation shall issue directing the person to appear in court. Defendant has cited no Georgia case which holds that this statute does not allow full custody arrest for minor traffic violations. To the extent Young v. City of Atlanta, 631 F.Supp. 1498 (N.D.Ga 1986), holds otherwise, the Magistrate is unpersuaded, especially when considered in light of the facts in the instant case and other Georgia statutes pertaining to traffic violations.

O.C.G.A. §17-6-11 provides that any person arrested for a traffic violation, except a violation for which a license may be suspended for a first offense, may deposit his driver's license with the arresting officer in lieu of bail or incarceration. This statute further states that the arresting officer shall give such person a receipt for

the license and the person shall be permitted to use the receipt to operate the motor vehicle during the pendency of the case for which license was deposited. Defendant Wilson was driving with a suspended license. Driving with a suspended license is an offense for which a license would be suspended upon the first conviction. O.C.G.A. §40-5-121(b). Thus, defendant Wilson could not have been issued a receipt to operate his motor vehicle and continue to Tennessee. Custodial arrest, requiring him to post bond and towing the vehicle until a licensed operator could pick it up, was legal and proper.

Finally, the Magistrate agrees with the government that O.C.GA. §40-15-53 cited and relied on by defendant deals with traffic violation bureaus and does not apply to this case because there is no evidence that a traffic violations bureau exists for Whitfield County, Georgia. Trooper Ralston had the authority to physically arrest defendant for driving with a suspended license, and the arrest was valid under Georgia law. O.C.G.A. §17-4-20(a).

Search and Seizure From the Person

Since the arrest of defendant for driving with a suspended license was valid, the search of his person and seizure of the .22 caliber Magnum revolver incident to arrest was lawful and proper. See United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973).

Search of the Vehicle

Further, having made a lawful arrest of defendant for driving with a suspended license, Trooper Ralston was authorized incident to the arrest to contemperaneously search the entire passenger compartment of the vehicle and any containers found within the passenger compartment. See New York v. Belton, 453 U.S. 454, 101 S.Ct.2860, 69 L.Ed.2d 768 (1981). Thus, the seizure of the short straw, brown bag full of used tissues, the tissue boxes, and the Anacin III bottle containing suspected co-

suspected cocaine was justified as a seizure incident to a lawful arrest.

Defendant's final argument is directed to the search and seizure of the cocaine from the trunk of the vehicle. In United States v. Ross, 456 U.S. 798, 102 S. Ct. 2157, 72 L.Ed.2d 572 (1982), the Supreme Court held that officers who have legitimately stopped a vehicle and have probable cause to believe that contraband is contained somewhere within it may conduce a probing search of all areas of the vehicle and container that might hold the contraband. The Court said that they may conduct a search of the vehicle that is as thorough as a Magistrate could authorize a warrant particularly describing the place to be searched. 456 U.S. at 800. Defendant maintains that Trooper Ralston lacked probable cause to believe the trunk of the vehicle contained contraband. The Magistrate, however, concludes that Trooper Ralston had probable cause to believe that contraband would be found in the trunk and that his search of the trunk and the seizure of the cocaine found therein was lawful.

Probable cause to search is said to exist when the facts and circumstances within the knowledge of the searching officer at the time of the search are sufficient to warrant a prudent man in believing that contraband or evidence of a crime will be found in a particular place. See Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). Probable cause has been defined as "fair probability". Illinois v. Gates, 462 U.S. 213, 103 S..Ct. 2317, 76 L.Ed.2d 527 (1983). Probable cause is the sum total of layers of information and the synthesis of what police have heard, what they know, and what they observed as trained officers. Reviewing courts weigh not individual layers, but the laminated total. United States v. Edwards, 577 F.2d 883, 895 (5th Cir.), en banc, cert. denied, 439 U.S. 968 (1978). Probable cause is concerned with probabilities, the factual and

practical considerations of everyday life on which reasonable and prudent men, who are not legal technicians, act. Brinegar, 338 U.S. at 175. Probable cause must not be judged with clinical detachment, but with a common sense view to the realities of normal life. United States v. Agostino, 608 F.2d 1035 (5th Cir. 1979). Former Chief Justice Burger has observed that the test of probable cause is not what reactions victims or judges might have but what the totality of the circumstances means to the trained eyes of an experienced police officer. Davis v. United States, 409 F.2d 458 (D.C.Cir.), cert. denied, 395 U.S. 469 (1969).

In the instant case, Trooper Ralston was aware of the following facts before he opened the trunk: (1) the defendant was traveling from south Florida, a principal source area for illegal drugs; (2) he was from Tennessee and was driving a vehicle registered in Florida to an individual identified by defendant as a co-worker; (3) he was allegedly traveling to Knoxville for the weekend, a long trip in a short period of time; (4) the defendant had a gun strapped to his leg which he identified as a knee brace; (5) the Anacin bottle found in the front seat was one-half to three-fourths full of a white powdery substance, which appeared to be cocaine; (6) there was a short straw in the passenger compartment which had a white powdery substance on it, boxes of tissues, and a grocery bag full of used tissues, items indicating that defendant had been using or sniffing cocaine; and (7) the amount of cocaine in the Anacin bottle was of a value in excess of what a mere user would normally possess. The Magistrate finds and concludes that the totality of these circumstances, along with Trooper Ralston's training and experience, were sufficient to warrant him in believing that there was a fair probability that other cocaine would be found in the vehicle, including the trunk. The search of the trunk was authorized under Ross and the cocaine

seized therefrom was not obtained in violation of defendant's rights under the Fourth Amendment.

RECOMMENDATION

In sum, the Magistrate recommends that defendant's motion to suppress the cocaine, firearm, and all other evidence discovered or derived from evidence discovered by Trooper Ralston in the search of his person and the vehicle on March 1, 1987, be overruled and denied.

AND IT IS SO RECOMMENDED this 1st day of October, 1987.

ALLEN L. CHANCEY, JR.
UNITED STATES MAGISTRATE

Excerpt from October 13, 1987 Hearing

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA	) :)	
vs.	:)	CR. # 87-09 R
BOBBY JOE WILSON, Defendant	:)	

Transcript of Hearings held in the above entitled cause before the Hon. Harold L. Murphy on October 13 and November 20, 1987.

Reported by machine shorthand; transcribed by computer aided transcription.

(Page 34 Original Transcript) It further provides that the arresting officer shall issue to such a person a citation which shall enumerate the specific charges against the person and the date upon which the person is to appear and answer the charges.

The Court does not consider that code section and the language of it to prevent an arrest under Official Code of Georgia, Section 17-4-20, which is the general arrest statute of the state authorizing officers to make an arrest. I think the intent of Code Section 17-4-23 is that an officer may make an arrest by the issuance of a citation, but that if an officer does make an arrest in the manner enumerated, he must issue to the person a citation enumerating the specific charges against the person and

the date upon which he is to appear and answer the charges.

The Court does not, as I say, construe that provision to prohibit an arrest for a violation of state law by taking physical custody of the person pursuant to Official Code of Georgia, Section 17-4-20.

Under such circumstances, the Court would find the arrest lawful, the search of the car, including the trunk to be lawful, and the Court will adopt the findings and recommendation of the Magistrate as the findings and recommendation of this Court.

MR RITCHIE: Very well, Your Honor. Your Honor,

STATE OF GEORGIA
GEORGIA BUREAU OF INVESTIGATION
DIVISION OF FORENSIC SCIENCES
OFFICIAL REPORT

CASE NUMBER 87-04407

JUNE 15, 1987

VICTIM:

SUSPECT:
WILSON, BOBBY JOE

OFFICERS:
JIM QUARLES

AGENCY:	COUNTY:
SHERIFF'S OFFICE	WHITFIELD
DA SUPERIOR COURT	WHITFIELD

DESCRIPTION:

ON MAR. 02, 1987 AT 11:19 THE FOLLOWING EVIDENCE WAS RECEIVED FROM DARLENE BRIDGES:

1. BROWN PAPER BAG SEALED WITH STAPLES CONTAINING ONE SMITH AND WESSON 9 MM PISTOL SERIAL #A251630
2. BROWN PAPER BAG SEALED WITH STAPLES CONTAINING ONE ROLL OF BROWN TAPE
3. ONE BROWN GAS TANK
4. SEALED EVIDENCE BAG CONTAINING ONE PAIR OF CHANNEL LOCKS

5. LARGE BROWN PAPER BAG CONTAINING FIVE GREEN PACKAGES SEALED WITH SOLVER DUCT TAPE CONTAINING COMPRESSED WHITE POWDER
6. BROWN PAPER BAG SEALED WITH STAPLES CONTAINING ONE WHITE PLASTIC "ANACIN" BOTTLE CONTAINING WHITE POWDER
7. BROWN PAPER BAG SEALED WITH STAPLES CONTAINING AN AMBER GLASS BOTTLE CONTAINING EIGHT BROWN CAPSULES INSCRIBED "SKF E14"

SERVICE REQUESTED:

DI DRUG IDENTIFICATION

RESULTS:

ITEM 5. . . THE 5, 087 GRAMS OF WHITE POWDER IS POSITIVE FOR COCAINE (84% PURITY --- 4, 273 GRAMS), SCHEDULE II.

ITEM 6. . . THE WHITE POWDER IS POSITIVE FOR COCAINE (1.5 GRAMS NET WEIGHT), SCHEDULE II.

ITEM 7. . . THE BROWN CAPSULES ARE POSITIVE FOR AMPHETAMINE, SCHEDULE II.

FA FIREARMS AND TOOLMARKS

RESULTS:

MICROSCOPIC EXAMINATION AND COMPARISON OF TEST TOOL MARKS MADE WITH THE TOOL (ITEM 4) WITH THE TOOL

MARKS ON THE GAS TANK (ITEM 3) FAILED TO REVEAL EVIDENCE TO CONCLUDE THE TOOL MADE THE TOOL MARKS.

FP FINGERPRINTS

RESULTS:

NO LATENT PRINTS WERE DEVELOPED ON ITEM #1 EXAMINED.

LH/ 6/15/87

RESPECTFULLY SUBMITTED,

J. Stephen Ellis, B.A.
Forensic Chemist

Kelly M. Fite, B.S.
Chief Firearms Examiner

Larry Hankerson, A.A.
Latent Print Examiner

CONSTITUTIONAL PROVISIONS

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
JAN 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-743

In the Supreme Court of the United States

OCTOBER TERM, 1988

BOBBY JOE WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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10 pp

QUESTIONS PRESENTED

1. Whether a state police officer conducted a valid search of petitioner's car incident to his arrest for driving with a suspended license when at the time of the search petitioner had been handcuffed and placed in the back seat of the officer's police car.

2. Whether the police officer's warrantless search of the trunk of petitioner's car was supported by probable cause.

3. Whether petitioner's arrest for driving with a suspended license was unlawful because it was a mere pretext for the police officer's conducting a search of petitioner's car for evidence of illegal drugs.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 853 F.2d 869.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1988. The petition for a writ of certiorari was filed on October 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following petitioner's entry of a conditional plea of guilty in the United States District Court for the Northern District of Georgia, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and carrying a firearm during the commission of a felony, in violation of 18 U.S.C. 924(c). Peti-

tioner was sentenced to consecutive terms of ten and five years' imprisonment on the two counts. He was also sentenced to a five-year special parole term on the drug count. The court of appeals affirmed.

1. The evidence presented at the hearing on petitioner's motion to suppress established that on March 1, 1987, Michael Ralston, a Georgia state police officer, stopped petitioner for speeding on an interstate highway. Officer Ralston obtained from petitioner his Tennessee driver's license and the Florida registration (in the name of a third party) for the car that he was driving. The officer observed several items on the front seat of petitioner's car, including a short white straw covered with a powdery substance, two brown paper bags filled with tissues, and what appeared to be an Anacin container. The officer then returned to his own car and radioed police headquarters to determine the status of petitioner's license and motor vehicle registration. Upon learning that petitioner's license had been suspended, the officer arrested petitioner. Pet. App. 2a-3a.

The officer next conducted a pat-down search of petitioner and discovered next to petitioner's left leg a .22 caliber revolver, which the officer seized. The officer then handcuffed petitioner and placed him in the back seat of the patrol car before searching the passenger compartment of petitioner's car. The officer discovered white powder, which he concluded was cocaine, inside the Anacin container located on the front seat. The officer then opened the trunk of the car, in which he found an outboard motor gasoline can containing several packages of what appeared to be cocaine. Pet. App. 3a.

Adopting the magistrate's findings and recommendations (see Pet. App. 40a-51a), the district court denied petitioner's motion to suppress the evidence discovered subsequent to his arrest (*id.* at 52a-53a). The court rejected

petitioner's claim that Officer Ralston's initial stop of petitioner's vehicle was unlawful because it was "a pretense to investigate for a possible drug violation" (*id.* at 46a). The court also concluded that petitioner's custodial arrest for driving with a suspended license was authorized by applicable Georgia law (*id.* at 46a-48a). Finally, the court concluded that the officer's searches of petitioner's person and car were likewise valid. According to the court, the search of the passenger compartment was a valid search incident to petitioner's arrest and the subsequent search of the trunk of the car was valid because it was supported by probable cause (*id.* at 48a-51a).

The court of appeals affirmed (Pet. App. 1a-17a). The court rejected petitioner's claim that his arrest for driving with a suspended license was a mere pretext to enable the officer to search for evidence of illegal drugs. The court held that Georgia law authorized petitioner's custodial arrest for driving with a suspended license (*id.* at 5a-13a). The court also concluded that the arrest was not invalid on pretextual grounds because, regardless of the arresting officer's actual motive, evidence regarding his department's normal policies and practices established that a reasonable officer would have arrested petitioner for driving with a suspended license, even absent any reason to conduct an unrelated search for narcotics (*id.* at 14a-17a).

ARGUMENT

1. Contrary to petitioner's claim (Pet. 5-9), the search of the passenger compartment of his car was a valid search incident to his arrest even though it occurred after petitioner had been handcuffed and placed in the back seat of the arresting officer's patrol car. In *New York* v. *Belton*, 453 U.S. 454, 460 (1981) (footnote omitted), this Court squarely held that where, as in this case, "a policeman has

made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Not only did the Court fail to qualify its ruling in the manner now suggested by petitioner, but such a qualification would be inconsistent with the Court's rationale in *Belton* to use a "generalization" to "establish the workable rule this category of cases requires" (*id.* at 460). Because the search in this case occurred just moments after the arrest, it was plainly "contemporaneous" with the arrest and therefore the very type of search permitted under *Belton*.[1]

In any event, review of petitioner's claim is not warranted because he failed to raise it before the court of appeals. With respect to the car search, petitioner made only the argument that the search incident to his arrest was invalid because it "was not justi[fied] by the pretextual arrest on a traffic violation of [petitioner]" (Pet. C.A. Br. 24-26). The court of appeals correctly rejected that argument (Pet. App. 6a n.3). Petitioner did not make the wholly distinct argument, which he now raises for the first time, that the search was invalid because at the time of the search petitioner had been handcuffed and placed in the back seat of the patrol car.[2] Having failed to appeal the

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[1] There is no merit to petitioner's claim (Pet. 7) that the search was not contemporaneous with the arrest because it was conducted "several minutes" after the arrest. The precise amount of delay between the arrest and the search is not clear from the record – because petitioner did not raise this issue in either the court of appeals or the district court – but, in any event, a delay only of "several minutes" is not sufficient to deprive a search of the required contemporaneity.

[2] Nor, as the court of appeals explained (Pet. App. 6a-7a n.3), did petitioner attempt to distinguish *Belton* on the ground that "the search in *Belton* took place after the police officer arrested the occupants for possession of marijuana, not for a traffic offense." The court of appeals accordingly "ha[d] no occasion to consider whether the *Belton*

district court's ruling on that ground, petitioner cannot now urge this Court's review of the question in the first instance.[3]

2. For similar reasons, review is not warranted of petitioner's contention (Pet. 10-12) that the search of the trunk of the car was invalid because it was not supported by probable cause. The district court's findings concerning the facts known to the officer at the time of the search—especially the discovery of the revolver on petitioner's person and the cocaine found in the Anacin container (see Pet. App. 50a)—show that the search of the trunk was supported by probable cause. In any event, petitioner failed to appeal that aspect of the district court's ruling to the court of appeals.

3. Finally, further review is not warranted of petitioner's claim (Pet. 13) that his arrest for driving with a suspended license was a mere pretext for the subsequent

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rule justifies the search of an automobile incident to a lawful custodial arrest for a 'mere' traffic offense" (Pet. App. 7a n.3). See *Gustafson* v. *Florida*, 414 U.S. 260, 266 (1974) ("We hold, therefore, that upon arresting petitioner for the offense of driving his automobile without possession of a valid operator's license, and taking him into custody, [the police officer] was entitled to make a full search of petitioner's person incident to that lawful arrest.").

[3] For this same reason, petitioner cannot of course validly claim that this case provides an occasion to review what petitioner characterizes as "conflicting interpretations" of *Belton* by various courts of appeals (see Pet. 8-9). We note, however, that even if he had made the argument below that he makes in this Court, and even if the court of appeals had rejected that argument, the decision of the court of appeals would not have conflicted with the decision of the Ninth Circuit in *United States* v. *Vasey*, 834 F.2d 782 (1987). The search challenged in *Vasey* was conducted 30 to 45 minutes after the arrest, which is why the Ninth Circuit concluded that the search "was not conducted contemporaneously with the arrest" (*id.* at 787). There is no indication that the search challenged in this case was similarly delayed.

search of his car for evidence of illegal drugs. Petitioner does not contend that the officer's initial stop of his car for speeding was illegal (see *ibid.*; Pet. App. 4a). Nor does petitioner challenge the court of appeals' ruling that the appropriate judicial inquiry is whether a reasonable officer would have made the arrest absent an illegitimate motivation (see Pet. 17-18; Pet. App. 14a). The thrust of petitioner's argument is instead that applicable Georgia law did not authorize his arrest for driving with a suspended license (see Pet. 18-21) and that "[s]ound public policy" supports his interpretation of Georgia law (see *id.* at 21).

As the court of appeals explained, however, the state statute upon which petitioner relies "permits the issuance of a citation and the deposit of a driver's license as an alternative to custodial arrest and incarceration, while leaving such arrest and incarceration as a viable procedure" (Pet. App. 10a). Indeed, as the court further explained, "[i]t would be most odd if Georgia police officers could accept a *suspended* operator license in lieu of detaining a driver and could give the driver a receipt which was the equivalent of a *valid* operator license in permitting the driver to use a motor vehicle in Georgia. Placing the driver under arrest and detaining him for a short time pending an appearance before a magistrate or a posting of bond seems a reasonable method of charging the driver with the offense of driving with a suspended license and removing the driver from the road." Pet. App. 17a (emphasis in original).

Finally, petitioner's pretext claim was properly rejected because, as the court of appeals also found (Pet. App. 16a), "[n]ot only was there an absence of evidence indicating that [Officer] Ralston's arrest of [petitioner] was pretextual; Ralston testified that the arrest conformed to normal policies and practices of dealing with persons driving with a suspended license, even those persons not

suspected of drug offenses." Because petitioner "offered no evidence suggesting that this was not the way the department operated, * * * the district court was entitled to credit [Officer] Ralston's testimony" (*ibid.* (footnote omitted)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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